COMPETITION COMMISSION

GROUPE EUROTUNNEL S.A. AND SEAFRANCE S.A. MERGER INQUIRY

**Completed acquisition by Groupe Eurotunnel S.A.
of certain assets of former SeaFrance S.A.**

Provisional findings report

19 February 2013

The Competition Commission has excluded from this published version of the provisional findings report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Non-sensitive wording is also indicated in square brackets.

Contents

Page

Summary

1. On 29 October 2012, the Office of Fair Trading (OFT) referred the completed acquisition by Groupe Eurotunnel S.A. (GET) of certain assets of former SeaFrance S.A. (SeaFrance) to the Competition Commission (CC) for investigation and report. We must publish our report by 14 April 2013.

2. GET is a public limited company listed in Paris and London. It is the parent company of two companies (The Channel Tunnel Group Limited and France Manche SA) which have formed a partnership (Eurotunnel) to operate the Channel Tunnel (the tunnel) between Coquelles (in the Pas-de-Calais in France) and Folkestone (in Kent in the UK) under a concession which expires in 2086.

3. SeaFrance was a wholly-owned subsidiary of Groupe SNCF which operated ferry services between Calais and Dover prior to November 2011.

4. Following a period of heavy losses, SeaFrance was placed in liquidation on 16 November 2011 and its ferry services ceased operating. In early 2012, taking advantage of the freeing of berthing slots in the port of Calais following the liquidation of SeaFrance, DFDS A/S (DFDS) launched a new service between Calais and Dover, using two chartered ships. DFDS had previously only operated short-sea ferry services between Dover and Dunkirk, using three vessels. DFDS's Channel operations were subsequently transferred into a joint venture (DFDS/LD) with the ferry operations of Louis Dreyfus Armateurs (LDA). (Together, routes via the tunnel, between Calais and Dover, between Dunkirk and Dover and some other routes across the English Channel are referred to as the short sea.)

5. Three of the four vessels operated by SeaFrance at the time it was placed in liquidation (the Vessels) and other assets were sold in a sealed bid process. The

Commercial Court of Paris (the Court) received bids from GET, P&O Ferries (P&O), Stena RoRo AB (Stena RoRo), and DFDS/LD. In order to secure the Vessels, GET acted together with a workers cooperative formed by former SeaFrance employees (a Société cooperative et participative, referred to as the SCOP) and on 11 June 2012, the Court decided in favour of GET's bid. The acquisition of the three Vessels and other assets was completed on 2 July 2012 (the transaction). Having prepared the vessels for service and acquired berthing slots at the ports of Calais and Dover, GET launched ferry services between Calais and Dover on 20 August 2012 under the MyFerryLink brand. Its newly-created subsidiary, MyFerryLink SAS (MFL) assumes the commercial risk for the operation, while the SCOP operates the ships and acts as a sales and marketing agent for MFL.

6. We examined the rationale for the transaction and found that GET's decision to acquire the former SeaFrance assets had been primarily driven by its concern that DFDS/LD would acquire the Vessels at a low cost and drive prices to customers down.

7. We considered whether the transaction was a 'relevant merger' situation within the meaning of the Enterprise Act 2002 (the Act), in particular whether the transaction, as structured, meant that an 'enterprise' had been acquired. Our assessment turned on the ease and speed with which the Vessels were put back into operation; the fact that GET and the SCOP acted together to secure control of the Vessels and other assets and/or that GET had material influence over the SCOP; the fact that a large proportion of the staff provided by the SCOP to run the MFL service were previously employed by SeaFrance; and the fact that GET's bid had assigned some value to the brand and goodwill. We provisionally concluded that, in the context of the particular industry concerned, these assets met the statutory definition of an 'enterprise', and constituted the activities, or part of the activities, of a business. We also provisionally

found that the transaction met the share of supply test and provisionally concluded that a 'relevant merger' situation had been created.

8. A key question for our assessment of the competitive effects of the merger is what would have happened absent the transaction, ie the counterfactual. We ruled out the pre-merger situation as SeaFrance had been placed into liquidation and considered approaches that we thought would have been available to the Court, had GET not bid for the former SeaFrance assets. We provisionally concluded that, irrespective of the approach taken, the most likely outcome absent the merger would have been one in which DFDS/LD acquired one, two or three of the Vessels and continued to operate five vessels across the short sea, having replaced one or more of its chartered ships with the acquired Vessels.

9. Using a combination of travel statistics, evidence received from freight customers and our own analysis of prices and events that had taken place on the short sea over the past five years, we provisionally concluded that the relevant markets in which to consider the competitive effects of the merger were:

   (a) transport services to passengers on the short sea (the passenger market); and

   (b) transport services to freight customers on the short sea (the freight market).

10. In order to assess the competitive effects of the merger, we first analysed how the supply of ferry services in the two markets may evolve in the short to medium term and in particular whether one of the current ferry operators could be expected to withdraw from the Dover–Calais route and/or the short sea. We provisionally concluded that in the context of excess capacity and continuing competition from MFL, DFDS/LD would be likely to cease operating services between Dover and Calais in the short to medium term. We did not reach an expectation that DFDS/LD would exit from the Dover–Dunkirk route in the short to medium term.

11. Were DFDS/LD to exit the Dover–Calais route and MFL to achieve its target market share, GET's share of passengers and freight transported on the short sea would increase substantially from over 40 per cent in each market. We provisionally found that the merger is likely to result in an increase in prices for passengers and freight customers by Eurotunnel relative to the counterfactual. This is because we would expect the transaction: to result in the internalization within GET of a proportion of the sales that would previously have been lost by Eurotunnel to ferry operators following a price rise; and to result in the weakening of competition between ferry operators.

12. We provisionally found that future entry or expansion in the relevant markets by ferry operators other than MFL or P&O is unlikely and that the extent of buyer power in the relevant markets is unlikely to be sufficient to protect the majority of customers from the adverse affects we have provisionally found are likely to arise from the transaction.

13. In the light of our assessment, we provisionally concluded that the transaction may be expected to result in a substantial lessening of competition in the freight and passenger markets. This could be expected to lead to an increase in the prices charged both by Eurotunnel and ferry operators in the two relevant markets. It could also lead to a worsening of service quality, for example through reductions in service frequency.

Provisional findings

1. The reference

1.1 On 29 October 2012, the OFT referred the completed acquisition by GET of certain assets of former SeaFrance to the CC for investigation and report. The CC 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.

1.2 Our terms of reference are in Appendix A. We are required to take our final decision by 14 April 2013.

1.3 This document, together with its appendices, constitutes our provisional findings, published and notified to GET in line with the CC's Rules of Procedure.[1] Further information relevant to this inquiry, including non-confidential versions of submissions received from GET and third parties, as well as summaries of evidence, can be found on our website.[2]

2. The companies

Groupe Eurotunnel SA

2.1 GET is a public limited company listed in Paris and London. It is the parent company of two companies (The Channel Tunnel Group Limited and France Manche SA) which have formed a partnership (Eurotunnel) to operate the Channel Tunnel between Coquelles (in the Pas-de-Calais, France) and Folkestone (in Kent, UK) under a concession granted in 1986. The concession gave the companies the right

[1] Rule 10 of the *Competition Commission Rules of Procedure (CC1)*, March 2006.
[2] www.competition-commission.org.uk/our-work/eurotunnel-seafrance.

and obligation to design, finance, build and operate the fixed link between the two countries originally for a period of 55 years. Following two extensions, the concession now expires in 2086. The tunnel opened in 1994.

2.2 The tunnel comprises two railway tunnels under the English Channel and a third service tunnel. GET also operates the terminals at either end of the tunnel at Folkestone and Coquelles and the trains and shuttles that transport cars, trucks and other vehicles and their passengers through the tunnel to provide shuttle services. The system is connected to the railway and motorway networks in the UK and France. GET receives income from providing shuttle services and from other users of the railway through the tunnel (in particular, Eurostar and rail freight companies), and from other activities, principally retail in the passenger terminal buildings.

2.3 GET also owns Europorte SAS (Europorte), which is a holding company for a number of businesses, including three French rail freight subsidiaries which were acquired in November 2009 and GB Railfreight Ltd (GBRf) which was acquired in May 2010. Europorte is engaged in rail freight operations primarily in the UK and France and involving local, national and international rail freight haulage, and operations at rail freight terminals for industrial customers. GET also intends to bid for the concession to manage the ports of Calais and Boulogne.

2.4 At 14 November 2012 GET had a market capitalization of €3.2 billion (£2.7 billion). Its shares are widely held by retail and institutional investors, in the latter case often in long-term infrastructure funds. GET's turnover grew by roughly one-third or €214 million to €854 million between 2009 and 2011. This was largely attributable to the acquisition of the French Europorte companies in November 2009 and of GBRf in May 2010.

2.5 GET is financed by a mixture of equity and debt. At 31 December 2011, equity amounted to €2.4 billion. The debt was provided principally by a term loan, comprising a number of tranches, with different conditions attached to each tranche and amounting in total to €3.8 billion. The average effective rate of interest on the term loan at 31 December 2011 was 5.8 per cent.

SeaFrance

2.6 Originally set up in 1945 as the Service de l'Armement Naval, SeaFrance was a wholly-owned subsidiary of Groupe SNCF (state-owned French railways) which operated ferry services between Calais and Dover.

2.7 Following a period of capacity expansion between 2005 and 2008, SeaFrance achieved breakeven in 2006 and 2007. Its financial performance deteriorated sharply in 2008, with sales decreasing by 8 per cent and the business incurring heavy losses, as a result of the general economic downturn, exacerbated by operational difficulties, including a strike in the first half of 2008. The company's heavy losses continued in 2009 and 2010. Performance in 2010 was further adversely affected by strikes.[3] In the period from 2001 to 2010, SeaFrance recorded losses in all years except in 2002, 2006 and 2007.[4]

TABLE 1 **Financial performance of SeaFrance, 2001 to 2010**

€ million

	2001	*2002*	*2003*	*2004*	*2005*	*2006*	*2007*	*2008*	*2009*	*2010*
Sales	175.3	259.2	214.4	207.8	192.0	226.4	241.8	222.7	176.1	150.8
EBIT	–11.3	14.8	–10.6	–6.8	–20.8	0.3	7.8	–26.6	–36.2	–33.0
Net income	–3.5	9.7	–7.6	–3.1	–9.3	7.9	15.4	–20.9	–57.7	–36.2

Source: SeaFrance Annual Reports 2001–2010.

[3] European Commission, 18 August 2010 letter to the French Government, paragraph 13.
[4] DFDS suggested that SeaFrance had only been able to last for so long due to financial support of the French Government.

2.8 In January 2009, SeaFrance announced a restructuring plan which was rejected by its parent company, SNCF. In February 2009, SeaFrance announced another re-structuring plan which would have resulted in the loss of 650 jobs, later reduced to 543 jobs. SeaFrance also reduced its fleet to four vessels (three ferries and one freight ship): the *SeaFrance Cézanne* and the *SeaFrance Renoir* were taken out of service in February and in August respectively. Following the restructuring announcement, LDA indicated that it was interested in taking over SeaFrance and Brittany Ferries also announced that it had made an offer for SeaFrance; neither of these offers was accepted by SNCF.[5] In October and November 2010, 353 redundancies were authorized and by summer 2011 the number of SeaFrance employees had been reduced to 872.[6]

2.9 It is against this backdrop that the events leading to the transaction took place.

3. The transaction and rationale for the merger

Events leading to the transaction

3.1 On 28 April 2010, SeaFrance applied to the Court for bankruptcy protection from its creditors and on 30 June 2010 the company was placed into administration.[7]

3.2 In July 2010, the Court administrators began searching for buyers for SeaFrance's vessels, contracts and staff as part of a plan to sell the business. The offers received by them in late July 2010 were not deemed serious and were not presented to the Court. In September 2010, SNCF appointed Crédit Agricole to find a buyer for its

[5] SNCF places advertisement for SeaFrance sale, Stuart Todd, Thursday 30 September 2010: www.lloydsloadinglist.com/freight-directory/searcharticle.htm?articleID=20017813520&highlight=true&keywords=Brittany+AND+seafrance&phrase=.
[6] Source: Tribunal de Commerce de Paris, Onzieme Chambre, jugement pronounce le 16 Novembre 2011 par sa mise à disposition au Greffe. RG. 2011070241. P.C. P201001398.
[7] Court minutes dated 11 June 2012.

shares in SeaFrance. SeaFrance disclosed that four firm offers were received but none was acceptable to SNCF and the sale process was suspended in early 2011.[8]

3.3 In February 2011, the French Government requested approval from the European Commission to provide €223 million of financing to SeaFrance in order to recapitalize it and support the implementation of a new business plan and an Employment Safeguard Plan. The refinancing was subsequently amended to a €166 million capital increase and a €100 million loan from SNCF.

3.4 In June 2011, the European Commission expressed significant reservations regarding this plan and eventually rejected it on 24 October 2011. Concurrently, the Court tried again to sell the business as a going concern. It received two offers: one for €1 submitted by the SCOP[9] and one from DFDS/LD, a joint venture between two other cross-Channel ferry operators, DFDS and Louis LDA,[10] for €5 million.[11]

3.5 Both of these offers were deemed inadequate by the Court in view of the fact that the market value of the three Vessels offered for sale was put at €50–€60 million in the lowest estimate received by the Court. Accordingly, on 16 November 2011 the Court ordered the liquidation of the business and, although the Court ruled that the business could continue its activities at this stage, ferry services ceased.[12]

3.6 The SCOP submitted a new bid, still at a value of €1, which was rejected by the Court on 9 January 2012. On 9 January 2012, the Court formally ordered SeaFrance to cease operating and placed the company into liquidation.

---

[8] Lloyd's List, 28 February 2012.
[9] It was in the process of being created at the time and was registered at the Tribunal de Commerce de Boulogne-sur-Mer on 29 December 2011 by members of SeaFrance's advisory board. The recruitment of former SeaFrance employees was started on 3 February 2012 and 457 applications were received. (Source: http://tempsreel.nouvelobs.com/economie/20120614.OBS8653/la-scop-seafrance-se-jette-a-l-eau.html; www.wk-transport-logistique.fr/actualites/detail/50580/transmanche-la-scop-des-anciens-de-seafrance-engrange-les-candidatures.html.)
[10] The joint venture between DFDS and LDA (DFDS/LD) was 82 per cent owned by DFDS and 18 per cent owned by LDA.
[11] Court minutes dated 11 June 2012.
[12] ibid.

3.7 Around the same time, GET and the SCOP were in discussions about a possible GET bid for the SeaFrance assets. The minutes of the GET board meeting on 13 January 2012 record that GET was in contact with the SCOP.[13] At the 27 January 2012 meeting of the GET board, the Chairman gave a progress report on discussions with the SCOP in the context of a possible GET bid for the assets.[14]

3.8 DFDS commenced operations on the Dover–Calais route in February 2012 with a vessel chartered from Louis Dreyfus Lines S.A.S. (LD Lines, a subsidiary of LDA), the *Norman Spirit*.[15] DFDS added a second vessel, the *Barfleur*, to the Dover–Calais route two months later, renaming it the *Deal Seaways*. In November 2012, DFDS/LD chartered the *Molière* (which had formerly been operated by SeaFrance) to replace the *Barfleur*, renaming the vessel the *Dieppe Seaways*.

3.9 The Court minutes dated 11 June 2012 (the Court minutes) note that under the French Commercial Code, the Court Receiver could decide whether to sell SeaFrance's assets in a public auction or in a private transaction. In view of the specialized nature of SeaFrance's assets, the Court Receiver decided that a private transaction would be the best way to maximize the sale price of the assets. The Court Receiver also appointed a shipbroking firm on 15 February 2012 (Parimar Franchecharte) to assist with the sale of SeaFrance's three ships (the *Berlioz*, the *Rodin* and the *Nord Pas-de-Calais*) and other assets.[16]

3.10 A deadline of 4 May 2012 was set for receipt of sealed bids. The bids were allowed to be in any or multiple configurations for the various assets of SeaFrance.[17]

---

[13] Minutes of the GET board , 13 January 2012.
[14] Minutes of the GET board , 27 January 2012.
[15] DFDS hearing summary, paragraph 10.
[16] The fourth vessel operated by SeaFrance, the *Molière*, was chartered and was returned to its owners when SeaFrance went into liquidation.
[17] Court minutes dated 11 June 2012.

3.11 The Court minutes recorded that the sale of SeaFrance's assets was publicized in a number of ways and non-confidential information was provided to over 40 parties, while more detailed information was provided to GET, DFDS/LD, P&O, Stena RoRo[18] and Liberty Maritime[19] subject to confidentiality agreements.

3.12 Four bids were received by the deadline and were opened in the Court on 10 May 2012. The bids were as follows:

(a) [✂];[20]

(b) DFDS/LD bid €30 million for the *Berlioz* and €25 million for the *Rodin*, or €50 million if it acquired both vessels;

(c) Stena RoRo bid €30 million for the *Rodin*; and

(d) GET bid €65 million for the *Rodin,* the *Berlioz* and the *Nord Pas-de-Calais* and other tangible and intangible assets. The GET bid set out that it would enter into a long-term relationship with the SCOP and that 'the production of crossings [would] be provided in practice by the SCOP'.[21]

3.13 A revised bid was submitted by DFDS/LD on 25 May 2012. This bid included all three vessels (in line with GET's offer) and was for €[✂] million. However, because the bid was received after the deadline it was not considered by the Court.[22]

3.14 The shipbroker managing the sale indicated to the Court that DFDS/LD (like GET) intended to use the vessel(s) it bid for on the short sea,[23] whereas Stena RoRo wished to acquire the *Rodin* as an investment for charter. This did not preclude its

---

[18] Stena RoRo is a ship charter business. It is part of Stena AB.
[19] Liberty Maritime Corporation is a New-York-based commercial shipping company which operates 11 US and foreign flag vessels. Liberty's fleet transports bulk, break bulk and bagged commodities as well as a variety of ro-ro cargoes around the world: www.libertymar.com/libertymar/about.html.
[20] The offer price was not disclosed in the Court minutes. It was noted in the OFT decision document.
[21] Court minutes dated 11 June 2012.
[22] The offer price was not disclosed in the Court minutes. It was noted in DFDS's response to the OFT's questions dated 29 August 2012.
[23] Short-sea routes consist of routes via the Channel Tunnel, and across the English Channel between Dover, Folkestone, Ramsgate and Newhaven on the English side and Calais, Dieppe, Boulogne and Dunkirk on the French side. It also includes the Ramsgate–Ostend route. This is also sometimes referred to as the short straits.

use on the short sea, for which it had been purpose built, but equally did not guarantee it.

3.15 The Court minutes recorded that the receiver recommended the GET bid on the basis that it was the best outcome for creditors given that it was:

(a) the highest bid;

(b) the only bid for all three vessels. The Court minutes noted that it would be a better outcome for the creditors if the *Nord Pas-de-Calais* were sold along with the *Rodin* and the *Berlioz* as the liquidator would then avoid the cost of ongoing maintenance of the vessel (while the cost of maintaining the vessels if they were not sold was estimated to be €2 million per month, the amount attributable to the *Nord Pas-de-Calais* was not specified);

(c) the only bid to preserve employment of former SeaFrance employees because of the SCOP. The Court minutes noted that 'while job creation is not a criterion established for the sole realization of assets in liquidation, it remains a significant factor in the subjective assessment'. The Court minutes recorded that GET said in its bid that the vessels would be purchased by a special purpose company and leased to an operating company supported by the SCOP; at the date of the bid nearly 400 former SeaFrance employees had applied to the SCOP and GET expected that approximately 530 former SeaFrance employees would be hired by the operating company; and

(d) the only bid to confirm that the vessels would remain under French flag. The receiver advised that the transfer of the vessels to a different flag could result in a tax cost to the liquidator of €35 million.

3.16 In addition to the three Vessels, the assets purchased by GET included the SeaFrance logos, brand and the trade name, computer software, websites and

domain names, IT systems, customer records and the inventory of technical and spare parts as well as IT hardware and office equipment.

3.17 GET completed its acquisition of the ex-SeaFrance assets on 2 July 2012.[24] It subsequently placed the vessels in 'flash dock' to prepare them for service again, acquired berthing slots at the ports of Calais and Dover and finalized agreements with the SCOP defining how the operation would be managed and controlled. GET told us that while the Court was supervising SeaFrance's liquidation, there were politically-motivated announcements to the effect that the Conseil Regional and the Mayor of Calais were willing to participate financially (the region has a particularly high rate of unemployment). However, to date, neither of these bodies has made any investment in MFL.

3.18 On 20 August 2012, GET's subsidiary company MFL commenced ferry operations between Dover and Calais using two of the former SeaFrance vessels, the *Rodin* and the *Berlioz*. The *Nord Pas-de-Calais* is a freight-only vessel, initially used as a reserve ferry when the other two vessels were undergoing maintenance [✂]. The vessels are owned by three separate subsidiaries of GET (Euro-Transmanche SAS, Euro-Transmanche 3Be SAS and Euro-Transmanche 3NPC SAS) and are chartered to the SCOP [✂] on the purchase price and refit cost).[25]

3.19 The SCOP operates the vessels and provides the crews. The SCOP is responsible for the pricing, marketing and selling of freight and passenger tickets as agent of MFL. MFL buys back ferry crossings from the SCOP and receives income from sales of passenger and freight crossings (and a commission on onboard sales), thus effectively assuming the commercial risk from the operation. MFL contracted to

[24] GET told us that the assets were bought on a 'sight unseen' basis from the liquidator. Before acquiring them, GET was therefore unable to inspect the assets to determine their potential commercial utility.
[25] Vessel charter parties for each of the three ships, paragraph 6.1.

purchase [✂] of operation at a provisional price per crossing in 2012 of €[✂]. The price of the first [✂] crossings was discounted by [✂] per cent. The price consists of a fixed and variable element (in particular, to allow for [✂]).[26]

3.20 GET also told us that it was public knowledge in France that under the terms of the liquidation agreed between SeaFrance's owner (SNCF), the Court and the SCOP, the SCOP would receive an indemnity of €25,000 for each SeaFrance employee that it employed. The liquidator agreed to pay these funds and part payment of these funds was made by the liquidator to the SCOP in late January 2013.

The rationale for the merger

3.21 GET explained that there were various rationales for its decision to bid for the acquired assets. These are set out below. Where relevant, we also set out other evidence relating to GET's stated rationales.

Preventing the acquisition of the vessels by a competitor and capacity rationalization

GET submission during the inquiry

3.22 GET told us that its bid for the assets was initially motivated by a desire to prevent a competitor from acquiring the vessels at far less than market values. It explained that, though its initial motivations were defensive, its thinking developed further and led to it taking the opportunistic decision to acquire the assets.

Contemporaneous evidence

3.23 Minutes of GET's 21 December 2011 board meeting record that the GET board discussed the possible consequences of the SeaFrance liquidation and noted the possibility that the vessels could be bought cheaply by a competitor, which could 'exacerbate a policy of some already aggressive Short Straits prices'. At the same

[26] Sub-charter and marketing contract between MFL and SCOP-SeaFrance, paragraphs 5.2, 8.3 & 8.5.

meeting, the board discussed making an offer for the vessels and considered the implications that this would have on competition on the short sea.[27]

3.24 At a meeting on 6 January 2012, the GET board concluded that it was important for GET to submit a bid to compete with the €5 million bid made by DFDS/LD. The GET board further discussed the value of the vessels and 'considered[28] the average cost of purchasing the vessels and the potential full year impact of a yield variation of [✂]'. At the same meeting, the board discussed the 'possibility of a monopoly situation and division of SeaFrance's market shares and establishment of the proper market'. One board member noted that 'capacity consolidation along with the current players could only be beneficial'.[29] This point was reiterated by the member at the 27 January 2012 meeting of the GET board, where the board also discussed competition matters relating to the proposed GET bid.[30]

3.25 The decision to place a bid for the assets in liquidation was made by the GET board when it met on 26 April 2012.[31] A presentation made to the board at that meeting set out the proposed structure of and financial projections for the new envisaged ferry operation. The presentation document does not set out the rationale for the proposed acquisition.[32] However, [✂].[33]

3.26 Annexed to the Court minutes is a report prepared by the shipbroker appointed by the Court, Parimar Franchecharte. In this document, the shipbroker sets out its observations on the bids received by the Court for the vessels and other assets. In respect of the GET bid, it notes that GET's strategy was essentially defensive and its intention was to 'hinder the implementation of a sea going rival (New Channel) (the

[27] Minutes of the GET board meeting, 21 December 2011.
[28] The official minutes in French use the term 'met en balance', which would be accurately translated as 'weighs'.
[29] Minutes of the GET board meeting, 6 January 2012.
[30] Minutes of the GET board meeting, 27 January 2012.
[31] Minutes of the GET board meeting, 26 April 2012.
[32] *NewLink Project - Structure proposée*, presentation to GET board, 27 April 2012.
[33] Presentation chiffree.

DFDS/LD joint venture), while enjoying the image of "white knight" for regional employment and the French maritime sector'.[34]

3.27 At GET's Management Forum (a group of around 150 managers within GET) on 26 June 2012, a section of the presentation considering next steps in the MFL project mentions a 'Rationalisation of capacity'. [35] The same presentation document states that one reason for GET to become a ship owner was to prevent DFDS acquiring the ferries at a low price, thereby mitigating the risk of a new price war.[36]

Complementary transport option and cost synergies

GET submission during the inquiry

3.28 GET explained that the introduction of MFL enabled it to offer a complementary transport option to its freight and passenger customers who either:

(a) could not use the Channel Tunnel, because they were carrying dangerous goods or oversized heavy loads; or

(b) preferred a cheaper but slower option (incorporating onboard facilities such as reclining seats, shops and restaurants).[37]

3.29 GET estimated that this traffic represented [✂] per cent of the market.[38] In addition, GET told us, [✂] significant number of [✂] vehicles which Eurotunnel was unable to transport for safety reasons [✂].

3.30 [✂]

3.31 GET told us that another related reason behind its bid for the SeaFrance assets in liquidation was a desire to provide an additional offering to customers that would

[34] Court minutes dated 11 June 2012.
[35] GET Management Forum presentation, 26 June 2012.
[36] GET presentation to Management Forum 26 June 2012.
[37] Initial submission to CC, paragraph 5.6.
[38] Eurotunnel initial submission, paragraph 10.5.

otherwise be lost when capacity on the shuttle services was limited or not available (for example, when the tunnel was closed for maintenance or due to an incident).[39]

Contemporaneous evidence

3.32 At GET's 27 January 2012 board meeting, the GET Chairman and Chief Executive Officer set out particular elements of a potential commercial strategy for MFL: targeting traffic that cannot travel through the tunnel and 'implementing a service at a lower cost while ensuring that the company would not suffer from themselves, any loss of its market share'.[40]

3.33 GET considered in particular that there could be demand from freight customers wanting to travel via the tunnel with time-critical loads but to use a ferry when returning with an empty lorry or carrying non-time-critical loads. GET considered that shuttle services and ferry operations were 'premium' and 'economy' services respectively and that there would be no risk of MFL cannibalizing demand for the shuttle services. GET also stated that it had a very good understanding of the cross-Channel market and would benefit from organization synergies and cost efficiencies from running complementary shuttle and ferry services.[41]

3.34 A GET internal document indicates that it was considering offering to freight customers contracts that covered shuttle services and ferry services. It considered that this could be attractive to customers as volume discounts would be based on the total volume across both modes. Furthermore, customers' administration costs would

[39] 2012 CA GET avril note marketing.
[40] Minutes of the GET board meeting, 27 January 2012.
[41] 2012 MForum 2 February 2012.

be reduced as invoicing would be combined and there would be a single point of contact at GET handling queries.[42]

Capacity expansion

GET submission during the inquiry

3.35 [✂] also told us that acquiring the ferries would be to its advantage because [✂].[43]

3.36 GET told us that accompanied freight demand was forecast to grow steadily over the next ten years. Annual growth rates were expected to be around 2 to 3 per cent (in line with pre-recession observed growth). This meant that the volume of trucks transported on the short-sea routes was expected to increase from around 3.4 million trucks in 2012 to around 4.5 million trucks in 2022, which corresponded to an increase of 1.1 million trucks. To grow in line with the market, [✂].

3.37 P&O submitted a contrary view, stating that it did not foresee any growth in the short-sea transport market in the short to medium term, pointing to the weakness of the economy.[44]

3.38 GET's evidence on the relative costs of expanding tunnel capacity or investing in MFL is slightly inconsistent. We were told that to increase GET's freight capacity from approximately [✂] million to [✂] million lorries a year (an increase [✂]) would require an investment of about €[✂] million and it would take about [✂] to [✂]. By acquiring the three vessels, GET said that it had achieved the same increase

[42] 2012 CA GET avril note marketing.
[43] Initial submission to CC, paragraph 5.7.
[44] Summary of hearing with P&O held on 14 January 2013.

immediately for an investment of €[✂] million (€[✂] acquisition and €[✂] million maintenance cost on the Vessels).[45]

3.39 However, in addition to the cost of the Vessels, GET also needs to fund the MFL business. In January 2013, GET announced that it anticipated that MFL would make losses of €25 million in the first 18 months of operation.[46] Prior to making its bid, GET anticipated that MFL would need funding of €[✂] million from 2012 [✂] to cover negative cash flow (including €[✂] million contingency), €[✂] million of which would be contributed by the former employees of SeaFrance and the balance by GET.[47]

3.40 GET also told to us that the total costs of investing in [✂]. It said that the lead times for the [✂] would have been [✂] longer than the time spent in establishing MFL. GET estimated that the lead time would be about [✂]. It also told us that it expected to [✂]. In 2012, it had anticipated [✂].

3.41 GET told us that it had not, prior to the liquidation of SeaFrance, considered buying or setting up a ferry company to increase capacity (or for any other reason). Instead, it saw the acquisition of the assets as a unique opportunity to add capacity cheaply and quickly, [✂]. GET told us that the establishment of MFL had not caused it to [✂].

---

[45] Initial submission to CC, paragraph 5.8.
[46] www.lloydsloadinglist.com/freight-directory/viewarticle.htm?articleID=20018017346.
[47] *Draft global offer for the acquisition of the operating assets of SeaFrance*, presentation to GET board, 11 April 2012.

Contemporaneous evidence

3.42 [✂] GET's Reference Document for 2007 states that 'the Tunnel's capacity does not constitute a significant constraint limiting the development of the different types of traffic'.[48] [✂]

3.43 [✂][49]

3.44 The members of the GET board, on the basis of the evidence presented to them, accepted that the acquisition of the Vessels was a viable project and approved a purchase price of €65 million.[50] The board does not appear to have considered any issues connected with increasing capacity at any time during the period when the acquisition was being discussed.

3.45 We have examined other internal GET documents relating to the acquisition. There is no evidence in these documents to suggest that GET made a bid for the acquired assets in order to increase capacity. GET told us that its consideration of the benefits of increasing capacity that could be realized by the acquisition came later in the process and, as such, was not reflected in the board minutes.

3.46 At the 26 June 2012 Management Forum, GET made presentations on both the rationale for the acquisition of the vessels and other assets and [✂].[51] Increasing capacity is not mentioned in the explanation of why GET should become a ship owner. No link between the acquisition and the [✂] appears to have been made.

---

[48] www.eurotunnelgroup.com/WorkArea/DownloadAsset.aspx?id=4095.
[49] GET 2012 Budget and Business Plan 2012–2016, p5.
[50] Minutes of the GET board meeting, 26 April 2012.
[51] GET presentation to Management Forum, 26 June 2012.

Market analysts' reports

3.47 GET provided us with reports from brokers and analysts within the previous 12 months dealing with the acquisition of the SeaFrance assets. We examined these to see if they offered any additional insight into the rationale for the transaction. A representative summary of the views expressed in these reports concerning GET's rationale is reproduced below:

(a) BPI Equity Research said in January 2012 that GET's proposal to bid appeared to be aimed at diversifying its risk exposure to the tunnel and increasing the strategic flexibility of its business model. The research also highlighted the opportunity for bundling ferry and tunnel crossings.

(b) RBC Capital Markets, writing in March 2012, concluded that GET's motive in bidding for the SeaFrance vessels was to ensure that ferry pricing was rational and that market entry was undertaken at a rational cost.

(c) Cheuvreux (Crédit Agricole) reported in May 2012 that GET expected an 8 per cent return from leasing the vessels, an 8 per cent market share and break-even within 18 months and interim losses of €20–€25 million. It also commented that DFDS/LD would be forced to exit after capturing only a 3 per cent market share.

(d) Societé Generale in June 2012 said that the motive was to prolong the favourable competitive market that had existed since SeaFrance had ceased operating. It put the capital cost at no more than €45 million (presumably meaning the initial equity investment).

(e) Raymond James, writing in July 2012, said that the acquisition would provide a back-up solution when the tunnel was in maintenance or the shuttles fully booked and prevent MFL from lowering its tariffs to increase capacity utilization. It estimated losses of €7 million in 2012 and €18 million in 2013.

(f) Exane BNP Paribas commented in October 2012 that it anticipated that DFDS/LD would decide to exit from the short sea by the end of 2013 as the number of ferry operators was unsustainable. It considered that the annual round of negotiations

with hauliers (ending in mid-December 2012) would be a critical determining factor in this.

(g) Oddo, also writing in October 2012, said that the deal was defensive, giving GET control over the competitive environment. It forecast a €25 million loss from the ferry business in the first 18 months of operation.

3.48 We have also seen a commentary prepared by Exane BNP Paribas following a discussion with GET and dated 24 May 2012.[52] In relation to the rationale for the deal, the analyst commented that GET had clarified that its purpose was twofold:

(a) First, to 'deprive DFDS from acquiring the ships at a low price'. In doing this, GET would 'force the DFDS/LD Lines JV … out of the Short Strait market as the ferry company would have a hard time staying profitable with its current capacity'. The analyst commented that 'Eurotunnel believes that without more capacity, DFDS/ LD Lines JV cannot be profitable on the Dover Calais (sic) and will end up exiting the market'.

(b) Secondly, to 'create some synergies with Seafrance[2]'.[53] The analyst noted that 'If the bid is successful, Eurotunnel will secure a LT (long term) contract with Seafrance2 and buy some wholesale ferry capacity. Eurotunnel to make some 'combined ferry+Shuttle' offers and potentially attract additional volume and market share with hauliers'.

3.49 The analyst concluded that GET believed that the acquisition would initially result in more capacity on the short-sea crossing (potentially putting pressure on prices in the short run) which would then lead to capacity cuts by competitors and eventually a better pricing environment.

---

[52] Exane BNP Paribas commentary on GET, 24 May 2012.
[53] Meaning the envisaged GET ferry operation.

Provisional conclusions on the rationale for the merger

3.50 We have considered carefully the various arguments advanced by GET as well as the other evidence set out above.

3.51 On balance, our provisional view is that of the three rationales advanced by GET, only one is both supported by internal documents and plausible from an economic perspective: that the acquisition of the ships would protect or enhance GET's future profitability both by preventing DFDS/LD from acquiring them and competing aggressively on price and by enabling GET to rationalize the level of capacity on the short sea in the future. The potential commercial upside of this strategy was recorded in the 6 January minutes of the board: an improvement in yield of €[✂] to €[✂], equivalent to a total of €[✂] to €[✂] million annually.[54]

3.52 Whilst we accept that having made the decision to buy the ships, GET may have identified the opportunity of offering complementary options to its customers as an additional upside of the acquisition, the proportion of the market that is not currently able to use the tunnel is in our view too small to make this a plausible rationale for the acquisition.

3.53 Finally, we saw no evidence in any of GET's internal documents that increasing capacity was a consideration in GET's decision to acquire the vessels. We noted the expected negative cash flow of the MFL business, upfront costs, additional risks involved in entering into this venture, and clear evidence that GET will not need additional tunnel capacity for at least three years. We therefore found it difficult to accept that increasing capacity was in any way a driver behind the decision made by the GET board to pursue the acquisition.

---

[54] Minutes of the GET board meeting, 6 January 2012.

4. The 'relevant merger' situation

4.1 Under section 35 of the Enterprise Act 2002 (the Act) and pursuant to our terms of reference,[55] we are required to decide whether a relevant merger situation has been created. A relevant merger situation is created if two or more enterprises cease to be distinct within the statutory period for reference and either the share of supply or turnover test set out in the Act is satisfied (the jurisdiction test).

4.2 In this section, we consider each of these elements in turn: enterprises ceasing to be distinct, the share of supply test, the turnover test and the statutory period for reference, before setting out our provisional conclusion on the jurisdiction test.

Enterprises: what are the relevant assets and do they constitute an 'enterprise'?

4.3 In this section, we consider whether the assets acquired by GET, taken together, amount to the activities, or part of the activities, of a business. We begin by setting out our guidance, then consider GET's views, before going on to consider the context for our analysis. We then go on to discuss the individual SeaFrance assets acquired by GET, in particular vessels, staff, brand and customer records, and also those not acquired, such as customer contracts and supplier contracts and how these relate to the activities, or part of the activities, of a business.

The legal test and CC guidance

4.4 The Act defines 'enterprise' as: 'the activities, or part of the activities, of a business'. 'Business' 'includes a professional practice and includes any other undertaking which

[55] www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/terms_of_reference_final.pdf.

is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'.[56]

4.5 The CC's Merger Assessment Guidelines[57] provide the following guidance:[58]

> The term 'enterprise' is defined in section 129 as the activities, or part of the activities, of a business. The enterprise in question need not therefore be a separate legal entity. The definition states that the activities in question should be carried out for 'gain or reward'. However, there is no requirement that the transferred activities should be profitable, or generate a dividend for shareholders, and the definition may include transferred activities conducted on a not-for-profit basis.
>
> In making a judgement as to whether or not the activities of a business, or part of a business, constitute an enterprise under the Act, the Authorities will have regard to the substance of the arrangement under consideration, rather than merely its legal form.
>
> An enterprise may comprise any number of components, most commonly including the assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill. In some cases, the transfer of physical assets alone may be sufficient to constitute an enterprise, for example where the facilities or site transferred enable a particular business activity to be continued. Intangible assets such as intellectual property rights are unlikely, on their own, to constitute an enterprise unless it is possible to identify turnover directly

---

[56] Section 129(1) and (3) of the Act.
[57] *CC2*, September 2010, paragraphs 3.2.2 to 3.2.4.
[58] The OFT's Jurisdictional and procedural guidance (OFT 527, Mergers: Jurisdictional and procedural guidance, June 2009) lists specific considerations that the OFT will have regard to in interpreting these principles, as follows:

- 'The transfer of 'customer records' is likely to be important in assessing whether an enterprise has been transferred.
- The application of the TUPE regulations would be regarded as a strong factor in favour of a finding that the business transferred constitutes an enterprise.
- The OFT would normally (although not inevitably) expect a transfer of an enterprise to be accompanied by some payment for the goodwill obtained by the purchaser. The presence of a price premium being paid over the value of the land and assets being transferred would be indicative of goodwill being transferred.' (Paragraph 3.10.)

related to the transferred intangible assets that will also transfer to the buyer. The business acquired may no longer be trading but this does not in itself prevent the business from being an enterprise for the purposes of the Act.

GET's views

4.6 GET considered that it did not acquire an enterprise, in particular because:

(a) The assets acquired were not enough on their own to run a business, and as a result MFL needed to procure additional business-critical resources, services and facilities from third parties in order to commence business. The Vessels were not operation-ready when GET acquired them and a significant amount of work was required on them.

(b) The database of ex-SeaFrance customers acquired was of limited commercial value and of no material assistance to MFL in starting its operations from scratch.

(c) MFL did not acquire the benefit of any ongoing contracts with customers or suppliers.

(d) There is no goodwill in the SeaFrance brand: the period during which the vessels had not been used for the provision of ferry services meant that all SeaFrance goodwill had evaporated long before the transaction took place. As a result, MFL is a completely new brand, has made no commercial use of the SeaFrance brand name and has actively sought to distance itself from the SeaFrance brand. In addition, the assets acquired by MFL were not used during the main sales opportunities for both the passenger and freight business in 2012. Consequently no passenger goodwill or business were transferred to MFL as part of this transaction.

(e) There was no transfer of staff from SeaFrance: the substance of the arrangement with the SCOP was that independently of, but concurrently with, its negotiations to acquire the vessels and other assets from the liquidator, GET negotiated an

arrangement to procure from the SCOP the necessary operational, maintenance and sales services. Then, in turn, the SCOP itself conducted a recruitment exercise to find the necessary staff.[59]

Context of the analysis

4.7 As a preliminary matter, the fact that the assets[60] were not trading at the time of the acquisition does not of itself exclude the CC's jurisdiction. This is not contested by GET.[61]

4.8 Nor is it necessary that the buyer acquire as part of the transaction everything required in order to operate the business concerned. Rather the question is whether, on balance, the totality of the assets transferred constitutes the activities, or part of the activities, of a business.

4.9 This assessment is specific to the industry and business concerned. As noted in the CC's guidance,[62] for some businesses the activities are enabled by physical assets alone, or intellectual property. In others, such as skilled service industries, key staff may constitute the 'enterprise'.

4.10 The CC considers that elements which can be readily obtained from third parties are less likely to be essential to the transfer of an 'enterprise', even if they are necessary to the running of the business. For example, bunker fuel is essential to a shipping business, but straightforward to obtain.

4.11 In the present case, a key part of the context for this analysis is the fact that GET did not acquire a trading business, as SeaFrance had ceased operations some seven

[59] Summarized from GET's initial submission, 19 November 2012, section 7.
[60] The CC uses 'assets' in the broad sense, ie to cover not only physical assets but also the benefit of contracts, intellectual property, records, goodwill etc.
[61] See, for example, GET's initial submission, 19 November 2012, paragraph 7.6.
[62] *CC2*, September 2010, paragraph 3.2.4.

and a half months before the date of completion.[63] The CC will make its assessment by reference to the assets actually transferred at the date of acquisition and will therefore take into account factors such as deterioration in the physical state of the vessels and reputational impact on the acquired brand during the non-trading period.[64]

4.12 In making its provisional assessment, the CC has had regard to its own previous decisions concerning the concept of an enterprise.[65] These enable it to benefit from previous thinking on the factors likely to be relevant in its consideration. However, it notes that each assessment is independent and must be considered on its own unique facts.[66]

4.13 Ultimately, the question of whether any given combination of assets constitutes an 'enterprise' is an economic assessment, requiring the balancing of competing factors in the context of the industry concerned.

4.14 In what follows, we consider the SeaFrance assets acquired by GET, in particular vessels, staff, brand and customer records, and also those not acquired, such as customer contracts and supplier contracts and how these relate to the activities, or part of the activities, of a business.

---

[63] SeaFrance ceased operating on 16 November 2011, and the sale of the liquidation assets to GET was completed on 2 July 2012.

[64] The OFT's Jurisdictional and procedural guidance (OFT 527, Mergers: Jurisdictional and procedural guidance, June 2009) lists specific considerations that the OFT will have regard to in cases where the business being acquired is not trading at the time of the merger:

- 'The period of time elapsed since the business was last trading
- The extent and cost of the actions that would be required in order to reactivate the business as a trading entity
- The extent to which customers would regard the acquiring business as, in substance, continuing from the acquired business, and
- Whether, despite the fact that the business is not trading, goodwill or other benefits beyond the physical assets and/or site themselves could be said to be attached to the business and part of the sale.' (Paragraph 3.11.)

[65] In particular, AAH Holdings/Medicopharma and Stagecoach Holdings/Lancaster.

[66] In particular, GET's arguments that those cases are distinguishable, for example because of the length of the non-trading period and the question of whether there was a deliberate intent to avoid merger control rules, appear to the CC to be of limited relevance to its assessment in the present case.

Vessels

4.15 GET acquired three Vessels as part of the transaction, the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais*.

4.16 GET acquired only three of the four vessels previously operated by SeaFrance on the short sea. In this regard, the CC notes:

(a) that the Act defines an 'enterprise' as including 'part of' the activities of a business (see above); and

(b) in any event, GET confirmed that three ships (including two passenger ships) were sufficient to allow it to offer a competitive service.[67]

4.17 All three Vessels had previously been operated to carry passenger and freight traffic on the short-sea route, and were therefore of a design suitable for this business without adaptation.[68]

4.18 However, at the time of GET's acquisition the Vessels had been out of use for seven and a half months, and were therefore not capable of being put directly into service. The evidence on the state of the Vessels indicates that:

(a) During the period of non-use they had been maintained in a state of 'hot lay-by', a minimum operating mode designed to maintain the condition of the ship, for example by running the engines regularly.[69] This was described to us as [keeping] the [ships] as good as [they] could be to be able to sell the [ships] in a very good condition.

---

[67] This allows for two Vessels to be operational while the third is in dry dock, for example undergoing routine maintenance.
[68] GET acknowledged that 'the Vessels have previously been operated on the Short Sea (and that they had specially fitted ramps for use here)'. GET argued that the Vessels were also suited for use on other routes around the world and that vessels from other routes might also have been suited for the short-sea route without adaptation. However, neither of these points detracts from the suitability of the Vessels GET actually acquired for the short-sea route on which they are currently being used.
[69] Court minutes, 11 June 2012: 'This minimum operating mode [ie 'hot lay-by'] preserves the ship's organs by running the engines regularly and conducting all operations required to retain most of the ship's certificates. Such operations require the use of qualified personnel.'

(b) Maintenance in a state of 'hot lay-by' was recognized by the Court-appointed administrator as necessary to help preserve the value of the Vessels in a sale.[70]

(c) The vessels were nevertheless not operations-ready. Before being used to provide the MFL service, the Vessels underwent a process of 'flash-docking' designed to return them to an operational state.[71] In particular, GET referred to the need to regain certificates entitling the Vessels to carry passengers and traffic. It is difficult to distinguish work required on the Vessels as a result of the non-trading period and work in the nature of routine maintenance, but GET told us that in total, before returning the Vessels to service, it undertook:

(i) one and a half months of intense work;[72] and

(ii) [✂].[73]

4.19 In summary, GET acquired vessels which were of suitable design and of sufficient number to operate a passenger and freight transport business on the short sea. These vessels were in a condition from which they were able to be brought into operation within two months of their acquisition.

Staff

Introduction

4.20 We now consider the relevance of the ex-SeaFrance staff currently engaged in operating the MFL service.

4.21 Ex-SeaFrance staff form a large proportion—[✂]—of the workforce currently engaged in operating the MFL service.[74]

---

[70] Court minutes, 11 June 2012: 'The designated broker confirmed that the ships' value would be greatly impacted by their complete shutdown. Therefore, the preservation of the creditors' mutual surety involves placing the ships in "hot lay-by". … It thus appeared that the sale in a private transaction while preserving the ships in a 'hot lay-by' situation was the best way to encourage high bids rather than an auction.'

[71] GET's initial submission, paragraph 7.11.

[72] GET's initial submission, paragraph 5.1.8. The precise period is 2 July 2012 to 20 August 2012.

[73] [✂]

4.22 However, the majority of these staff are not employed by GET, but by the SCOP, which operates the MFL service under a series of commercial agreements with GET.

4.23 It is therefore necessary to consider the relevance of the SCOP workforce to the issue of whether two 'enterprises' have ceased to be distinct. In particular, should those staff be included in the bundle of assets to which the CC must apply the 'enterprise' test?

4.24 The CC considers that the ex-SeaFrance employees of the SCOP are relevant to its jurisdictional assessment if either:

(a) GET and the SCOP 'acted together' during the bidding period to secure control of the liquidation assets. If this is the case then they are 'associated persons' within the meaning of section 127 of the Act, with the specific legal consequence that they (and any bodies corporate which they or any of them control) 'shall be treated as one person … for the purpose of deciding under section 26 whether any two enterprises have been brought under common ownership or common control …'. This would mean that the ex-SeaFrance assets controlled by GET and the SCOP must be considered together for the purposes of applying the 'enterprise' test.

(b) The SCOP's economic dependence on GET is such as to confer on GET 'material influence' over the SCOP, and therefore its employees. The CC may treat material influence as amounting to 'control', which would mean that the SCOP's assets were also part of those assets brought under 'common control' with the Eurotunnel business, and therefore relevant to the 'enterprise' test.

4.25 These two alternative (though related) questions are considered in turn below.

- - - - - - - - - -

[74] The SCOP currently employs [✂] staff, of which [✂] are ex-SeaFrance (GET's initial submission, paragraph 7.18.2). (It is also notable that the SCOP was itself established by ex-SeaFrance employees.) MFL also employs [✂] staff on its own account, [✂] of which are ex-SeaFrance (GET's initial submission, paragraph 7.18.1).

4.26 In neither case is the CC precluded from taking account of the SCOP's ex-SeaFrance staff on the grounds that they were not transferred from the liquidator, whether directly or under TUPE regulations, but recruited in the market by the SCOP.[75] There is no requirement in the Act that all the assets making up the enterprise are obtained through the same route or at the same time, only that two enterprises cease to be distinct within the relevant time frame.[76]

Relevance of the SCOP's employees: 'associated persons'

4.27 Under section 127 of the Act, 'two or more persons acting together to … secure control of any enterprise or assets … shall be regarded as associated with one another'.

4.28 This question therefore involves examining the considerations leading up to GET's bid, the bid itself and the reasons for GET's success to analyse whether GET and the SCOP can be said to have 'acted together' to secure control over the liquidation assets.

4.29 GET has argued that:

(a) Its negotiations with the SCOP were 'independent' of its negotiations with the liquidator.[77]

(b) The SCOP is independent from GET[78] and their relationship is at arm's length.

4.30 There is, however, significant evidence indicating that the SCOP acted together with GET in preparing GET's bid, and its involvement was instrumental in securing the SeaFrance assets for GET. In particular:

---

[75] GET's initial submission, paragraph 7.18. The same paragraph also points out that the recruitment exercise did not favour ex-SeaFrance employees, some of whom were declined positions.
[76] See, for example, the OFT's decisions in CineWorld/Hollywood Green Leisure Park and HMV/Zavvi.
[77] GET's initial submission, paragraph 7.20.
[78] GET's initial submission, paragraph 7.18.

(a) GET and the SCOP were in advanced discussions over the SeaFrance project from (at least) January 2012.[79]

(b) GET's own internal considerations of the proposed acquisition were informed by the SCOP's business plan:

(i) in January 2012 the SCOP's business plan was presented to the GET board;[80] and

(ii) the document 'Groupe Eurotunnel Newlink Project—Proposed Structure' dated 26 April 2012 states: 'The financial simulations presented are based on the "BP SCOP" (e.g. the business plan prepared by the former workers of SeaFrance), which has been reviewed only lightly by Eurotunnel to date'.[81]

(c) [✂][82,83]

(d) The Court order approving GET as the acquirer of the SeaFrance assets makes reference to the arrangement with the SCOP and in particular states:

> However, Eurotunnel said in its bid that the ships would remain under the French flag and that 535 former SeaFrance employees would be hired by an operating company under the project. The ships would be purchased by a special purpose company and leased to an operating company supported by a previously existing SCOP … without any performance guarantee being provided. While job creation is not a criterion established for the sole realization of assets in liquidation, it remains a significant factor in the subjective assessment.

---

[79] Board Minutes Groupe Eurotunnel SA 6 and 13 January 2012 and 29 February 2012. GET told us that further documentary evidence does not exist, but confirms that there was a process of unofficial discussions with the SCOP. Press reports also suggest that GET was happy to talk in public about its proposed relationship with the SCOP and the importance of that relationship to the bid. See, for example: www.connexionfrance.com/Eurotunnel-plans-buy-SeaFrance-ferries-13415-view-article.html and www.latribune.fr/entreprises-finance/services/transport-logistique/20120301trib000685796/eurotunnel-devoile-son-projet-maritime-avec-seafrance.html.

[80] Board Minutes Groupe Eurotunnel SA 6 January 2012.

[81] GET also told us that 'GET and the SCOP worked together on the business plan as presented in the Project Newlink document'.

[82] p5.

[83] p9.

(e) Completion of the purchase of the liquidation assets took place on 2 July 2012. On the same date MFL and the SCOP signed a Memorandum of Understanding.

4.31 The CC therefore provisionally considers that the SCOP actively assisted in preparing GET's bid, and GET and the Court both considered that the SCOP relationship was an important factor in making GET's bid the most attractive. As a result, the CC has provisionally concluded that GET and the SCOP acted together in order to secure control by GET over the liquidation assets, and are therefore associated persons within the meaning of section 127.

4.32 As a result, the ex-SeaFrance employees recruited by the SCOP are part of the bundle of assets the CC must consider when applying the 'enterprise' test.

Relevance of the SCOP's employees: 'material influence'

4.33 The important relationship between GET and the SCOP also raises the question of whether GET has 'material influence' over the SCOP, and therefore over its employees.

4.34 As envisaged throughout the bidding process by GET, the SCOP and the Court, when GET acquired the liquidation assets, at the same time GET also entered into contractual arrangements with the SCOP under which the vessels are chartered to the SCOP under a bareboat charter, and the SCOP operates the ferry service under a service contract, using staff employed by it.

4.35 Under these arrangements, the SCOP is economically highly dependent on its relationship with GET. In particular:

(a) [✂]

(b) GET told us in early January 2013 that in order to ensure the continued survival of the SCOP MFL was providing working capital in the form of paying in advance and not claiming contractual price reductions, though it has since started to recoup the value of these price reductions.

(c) The SCOP has no viable source of income other than GET. The contract between the SCOP and GET requires the SCOP to undertake its short-sea crossings [✂].[84]

(d) Further, it is clear that the SCOP is not in a position to establish its own service. The document 'Groupe Eurotunnel NewLink Project—Proposed Structure' rejected this option because the SCOP would not have been able to raise the necessary finance.

(e) Finally, [✂] was recruited by GET to head up the SCOP, and is both the CEO of the SCOP and a manager of MFL.[85]

4.36 The CC has therefore provisionally concluded that, in light of the SCOP's economic reliance on its arrangements with GET and its subsidiary MFL, GET has a degree of influence over the SCOP, and therefore the SCOP's employees, which is 'material' in the context of its jurisdictional assessment. The CC also provisionally considers that it should treat this material influence as amounting to control.

4.37 As a result, the SCOP workforce, along with the liquidation assets, have been brought under 'common control' with GET's existing business. This alternative reasoning therefore leads the CC to the same provisional conclusion as reached above in its consideration of the 'associated persons' analysis, ie that the SCOP

[84] GET disagreed with this interpretation of the contract. It stated that a more appropriate interpretation of the relevant clause was that 'in consideration for MFL's undertakings, the SCOP will perform the services and will not sell them to the market in its own name'. In this regard, we note first that GET does not translate the 'et pour son compte' and second that, taken together, clauses 7.1 and 7.2 indicate that SCOP is required to act exclusively for MFL, at least on the cross-Channel route, as in addition to the restrictions referred to above, SCOP may not enter into any bare boat charters with any other vessel owner on the cross-Channel route without the prior agreement of MFL.

[85] Draft Global Offer for the Acquisition of the Operating Assets of SeaFrance, 11 April 2012.

employees are part of the bundle of assets to which the CC must apply the 'enterprise test'.

4.38 In summary, the CC considers that the ex-SeaFrance staff employed by the SCOP fall to be included within the CC's assessment of whether two 'enterprises' have ceased to be distinct, either because GET and the SCOP acted together to secure control of the liquidation assets and are therefore associated persons, or because GET has material influence over the SCOP.

Other assets acquired

4.39 As part of the acquisition, GET acquired a database of SeaFrance's freight and passenger customers, as well as its trade and domain names.

4.40 In this regard, the CC notes the decision recorded [✂].[86] This indicates that some positive value was ascribed internally to the assets other than the Vessels. As with any proposed component of the proposed enterprise, it is necessary to consider the importance of these assets in the context of the particular business concerned. GET told the CC that:

(a) passenger customers show very little brand loyalty, and travel relatively infrequently; and

(b) freight customers typically multi-source, and are readily identifiable by monitoring freight movements harbour-side.[87]

4.41 This suggests that the CC should give relatively limited weight to the presence or absence—or quality—of brand[88] and customer lists in assessing whether GET acquired an 'enterprise'.

---

[86] In French: 'ainsi que les actifs nécessaires à l'exploitation' of the vessels.
[87] GET's initial submission, paragraph 7.14.2.

4.42 GET argued that the brand had negative value, citing SeaFrance's history of strikes, and the nine-month interruption in service covering some of the busiest times[89] of the year.[90] It is also noteworthy that GET rebranded the service immediately, selecting a new and unknown name over 'SeaFrance'.[91]

4.43 Nevertheless, GET's offer to the French liquidator included €1 million attributable to the trade and domain names of SeaFrance[92] and the www.seafrance.com website is still in use, directing visitors to MyFerryLink.[93]

4.44 These factors indicate that GET acquired goodwill with some, if limited, positive value.

4.45 In relation to customer lists, GET provided[94] details of a marketing exercise carried out by MFL, [✂]. It also pointed out that its payment for IT systems, software and data including customer lists was €[✂] million, less than [✂] per cent of the acquisition value, and in any event the pre-acquisition valuation was based on limited information and may not have been accurate.

- - - - - - - - - -

[88] This is further supported by GET's initial submission, 21 November 2012, paragraph 10.31: 'Moreover, any possible additional advertising expenses inherent in the arrival of another player are limited. In fact, MFL's planned marketing and business expenses for the introduction of its new maritime transport operations should not exceed [✂]% of its turnover in 2013. For example, the advertising intended for passenger transport is limited to promotional advertising highlighting a fare offer and the time limits framing this offer, and advertising generally occurs via digital media, which is easier and cheaper than advertising via television or newspapers.'

[89] GET describes the point as follows: 'The period whilst SeaFrance was in liquidation (and no commercial activities were undertaken) also covered the busiest travel time of the year for freight customers (i.e. December 2011) and for passenger customers (i.e. Christmas 2011, and the Half Term, Easter and Summer periods in 2012).'

[90] In its initial submission of 19 November 2012, GET also noted the fact that SeaFrance ceased operating 'immediately, abruptly and overnight', and argued that 'due to previous poor management, the company's reputation for service quality and reliability had been poor' (para 5.9).

[91] GET also told us that as part of preparing its 2012 audited accounts, it will depreciate the value of the SeaFrance trademarks it acquired to €[✂].

[92] Groupe Eurotunnel SA: 'Offer to buy the assets of SeaFrance', 4 May 2012, p16.

[93] GET has argued that this 'does not … indicate that there was material goodwill in the SeaFrance brand' (initial submission, 19 November 2012, paragraph 7.17). However it does appear to suggest that there is some residual goodwill value, or MyFerryLink would have withdrawn the web page.

[94] GET's initial submission, paragraph 7.14.3.

4.46 The CC considers that it is difficult to judge objectively the value or quality of the customer lists acquired by GET, but given the other assets acquired by GET, considers it unnecessary to reach a conclusion on this issue.

4.47 On balance, the CC provisionally considers that the fact that some positive value was ascribed to the goodwill is a factor pointing towards classifying the acquired assets as an enterprise.

Assets not acquired by GET

Customer contracts

4.48 All SeaFrance's customer contracts terminated when it went into liquidation, and accordingly no such contracts were acquired by GET as part of the transaction.

4.49 In this context it is important to consider the nature of customer contracts in this sector, their importance to the running of the MFL business and what would be required in order to negotiate replacement contracts.

Freight traffic

4.50 In relation to freight traffic, GET told the CC that customers typically entered into framework purchase arrangements on an annual basis, with negotiations usually taking place in winter for services in the following calendar year. It appears that, in principle, such contracts may be important for the successful running of a ferry business.[95]

4.51 Typically, freight contracts are not exclusive, and it is common for customers to have contracts with several providers. The arrangements may, however, specify price and credit terms on the basis of certain volume levels. GET submitted that as a result of

[95] GET's initial submission, 19 November 2012, paragraph 7.23, states that about 70 per cent of the turnover generated by SeaFrance from the acquired vessels had been attributable to freight customers.

volume commitments and rebates in these contracts, MFL faced material difficulties in persuading freight customers to use the MFL service prior to the winter 2012 negotiations (for 2013 services).[96]

4.52 GET has not suggested that it faced any particular difficulties securing contracts for the 2013 period.[97]

4.53 This suggests that, while GET did not receive the benefit of any existing freight contracts on acquisition, the opportunity to negotiate contracts arose relatively quickly (within five months of commencing operations), and MFL was able to compete for those contracts on a normal commercial basis.

Passengers

4.54 GET acknowledged that 'passenger customers tend to use ferry services for less than one return trip per year and do not enter into contracts with ferry companies'. Accordingly passenger customer contracts do not appear to be of importance to the running of the MFL business, and their absence is likely to be of very limited relevance to the question of whether the acquired assets constitute an enterprise within the meaning of the Act.

Supplier contracts

4.55 GET has described a number of supplies required to operate the MFL service, contracts for which were not included in the acquired assets, namely fuel supply, insurance, harbour slots and port access rights and charts. It also refers to the lack of

[96] GET's initial submission, paragraph 10.8.
[97] GET refers to possible advantages enjoyed by ferry operators with more extensive route services.

stock, office space or property from which MFL could carry on business and corporate support services.[98]

4.56 The CC notes that these supplies were secured in time for the commencement of MFL's operations one and a half months after the date of acquisition.[99] The CC has seen no evidence to suggest that there is a shortage of any of these supplies on the market. GET did, however, submit that in securing contracts it took time to disassociate itself from the tarnished reputation which had attached itself to the vessels. Further, as noted above, it is not necessary that the buyer acquire everything required to operate the business concerned.

4.57 In particular, the CC has given consideration to harbour slots, which appear by their nature to be of limited supply. It is nevertheless clear that in this instance GET was able to obtain the slots in good time. Indeed GET has emphasized that it faced no difficulties securing slots:

(a) 'MFL experienced no difficulties in obtaining slots at either Dover or Calais, which are the busiest ports on the Short Sea. This was achieved in a short period of time as a new operator following discussions after completion of the acquisition on 2 July 2012.'

(b) 'GET does not consider that harbour slots are a material barrier [to entry]; it acquired from scratch new slots within a matter of weeks at Dover and Calais'.[100]

4.58 In sum, the CC provisionally considers that the absence of customer and supplier contracts is of some, but limited, relevance to the 'enterprise' assessment.

---

[98] GET's initial submission, paragraph 7.11.
[99] The precise period is 2 July 2012 to 20 August 2012. Indeed in relation to insurance the CC understands that policies were required to be, and were, in place within 72 hours of the acquisition. Some negotiation with potential suppliers will have occurred prior to the date of the acquisition, but the short period between acquisition and commencement of operations nevertheless suggests that these supplies are readily obtainable.
[100] GET's initial submission, 21 November 2012, paragraph 11.33.

Provisional conclusions

4.59 In total, the assets to be taken into account for this assessment comprise:

(a) vessels which were of suitable design and of sufficient number to operate a passenger and freight transport business on the short-sea route; these vessels were in a condition from which they were able to be brought into operation within two months of the acquisition taking place;

(b) those former SeaFrance employees who now comprise [a large proportion] of the staff engaged in running the MyFerryLink service;

(c) brand and goodwill carrying some, but limited, positive value; and

(d) customer lists, though given the difficulty in assessing their value, the CC has disregarded these in its provisional assessment.

4.60 Together GET and the SCOP brought these assets under common control for the purposes of section 26 of the Act.

4.61 On the other hand, GET did not acquire control of ex-SeaFrance customer and supplier contracts. For the reasons given above, the CC has provisionally concluded that this absence is of some, but limited, relevance to the 'enterprise' assessment.

4.62 On balance, and taking all of the above factors into account including the length of time between the end of SeaFrance's operations and the start of MFL's operations, the CC has provisionally concluded that, in the context of the particular industry concerned, the assets referred to in paragraph 4.59 above do meet the statutory definition of an 'enterprise', and constitute the activities, or part of the activities, of a business.

Ceasing to be distinct

4.63 The CC is satisfied that the assets acquired from the liquidator are under GET's control. As described above, it is also provisionally satisfied that the ex-SeaFrance staff employed by the SCOP have also ceased to be distinct from GET's other businesses.

Share of supply test

4.64 The share of supply test applies where, as a result of enterprises ceasing to be distinct, at least one-quarter of goods or services of any description which are supplied in the UK, or in a substantial part of the UK, are supplied by or to one and the same person.[101]

4.65 As noted in the CC's Merger Assessment Guidelines:[102]

> The Act expressly allows the Authorities a wide discretion in describing the relevant goods or services, requiring only that, in relation to that description, the parties' share of supply or acquisition is 25 per cent or more. The share of supply is different from a market share …, and goods and services to which the share of supply test is applied need not amount to the market defined for the economic analysis. In addition, the Authorities may have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met—the value, cost, price, quantity, capacity, number of workers employed or any other criterion may be used to determine whether the 25 per cent threshold is reached.

[101] Section 23(3) & (4) of the Act.
[102] *CC2*, September 2010, paragraph 3.3.5.

4.66 The CC provisionally considers that an appropriate frame of reference for the application of the share of supply test in accordance with its guidance above is the supply of passenger and freight transport services across the short sea. GET submitted to the OFT that its share of supply on this basis exceeded 25 per cent during the 2011 calendar year.[103] Because GET's pre-existing share exceeded 25 per cent, any increment in share of supply, however small, will result in the share of supply test being satisfied.

4.67 GET argued that the relevant increment in share of supply related to the period since MFL started operating commercially. In the period from 20 August 2012 to [✂], which if annualized would be equivalent to a share of supply of about 1 per cent on the short-sea route for either freight or passenger transport.[104] Therefore, the CC provisionally concludes that the share of supply test is satisfied.

Turnover test

4.68 Given the CC's provisional conclusion on the share of supply test above, it has not been necessary to reach a conclusion on whether the turnover test under section 28 of the Act is satisfied.

Statutory time limit

4.69 Section 24 of the Act stipulates that a reference must be made to the CC within four months of the enterprises ceasing to be distinct.

4.70 The transaction was completed on 2 July 2012. On the same date, GET and the SCOP signed a Memorandum of Understanding. The reference was made to the CC on 29 October 2012. The statutory time limit has therefore been observed.

---

[103] OFT reference decision, paragraph 32.
[104] GET's initial submission, 19 November 2012, paragraph 5.5.

Provisional conclusion

4.71 The CC therefore provisionally concludes that the jurisdiction test under the Act is satisfied and a relevant merger situation has therefore been created.

5. Counterfactual

5.1 Before we turn to the effects of the transaction, we need to assess what we expect would have been the competitive situation in the absence of the transaction. The latter is called the 'counterfactual'.[105] It provides a benchmark against which the expected effects of the proposed transaction can be assessed.

5.2 The *Merger Assessment Guidelines*[106] state the following:

> The application of the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'. The counterfactual is an analytical tool used in assessing the question of whether the merger gives rise to an SLC. While based on evidence obtained by the Authorities in their investigations, it is generally not comparable in detail to their analysis of the competitive effects of the merger.

5.3 In this section, we first set out GET's views on the counterfactual. We then discuss our assessment of the counterfactual before reaching our provisional conclusion.

GET's views on the counterfactual

5.4 GET told us that, in its view:

(a) The counterfactual could not be the pre-liquidation operations of SeaFrance given the difference in scale between those operations and the assets purchased

[105] *CC2*, paragraph 4.3.1.
[106] *CC2*, paragraph 4.3.1.

by GET and because those assets were not operational for many months prior to the acquisition.

(b) The counterfactual should not be assumed to be the purchase of all the vessels and their use on the short-sea route by another purchaser because the Court had deemed GET's bid to be the only acceptable and compliant tender for the Vessels at a price above the Vessels' liquidation value.

(c) If GET had not been involved in the bid process, the most likely outcome was that the Vessels would have sold in a public auction in which additional bidders would have participated and might have resulted in the Vessels being sold individually or as a group for use on the short-sea route or for short-sea crossings in other geographical locations or adapted for use on longer crossings.

(d) The relevant counterfactual was the situation that existed at the time immediately prior to GET's acquisition of the Vessels when DFDS was operating on the Dover–Calais route with two vessels.

5.5 GET also submitted that SeaFrance satisfied the exiting firm test in the CC's *Merger Assessment Guidelines*[107] for the following reasons:

(a) SeaFrance had gone into liquidation and had ceased operating in November 2011.

(b) GET considered that there were no alternative purchasers for the assets above their liquidation value (which GET defined as being the amount that GET paid).

(c) SeaFrance's sales were redistributed to other competitors (and therefore there were no sales or customers transferring with the assets to GET from which MFL benefited when it began operations).

---

[107] *CC2*, paragraphs 4.3.8–4.3.18.

Our approach to the counterfactual assessment

5.6 We had regard to our *Merger Assessment Guidelines*[108] on the approach to the counterfactual:

> To help make this judgement on the likely future situation in the absence of the merger, the CC may examine several possible scenarios, one of which may be the continuation of the pre-merger situation, but ultimately only the most likely scenario will be selected as the counterfactual. When it considers that the choice between two or more scenarios will make a material difference to its assessment, the CC will carry out additional detailed investigation before reaching a conclusion on the counterfactual. However, the CC will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight. Given that the counterfactual incorporates only those elements of scenarios that are foreseeable it will not in general be necessary for the CC to make finely balanced judgements about what is and what is not the counterfactual.

5.7 The Guidelines also state:

> If the CC considers that there were alternative purchasers, it will try to identify who the alternative purchasers might have been and take this into account when determining the counterfactual. The analysis of the impact on competition of the merger (ie whether the effect of the merger under review would be substantially less competitive than the effect of

[108] ibid, paragraph 4.3.6.

an acquisition by an alternative purchaser) would be part of the SLC analysis.[109]

5.8 We took the following approach to identifying the appropriate counterfactual in this case:

(a) We ruled out the pre-merger situation, ie the continuation of SeaFrance as an independent operator, as a realistic counterfactual given that the administration and receivership process had not resulted in the sale of the business as a going concern and the Court ordered the liquidation of SeaFrance on 16 November 2011 and terminated the business continuity provision on 9 January 2012.

(b) Given that the pre-merger situation is not an appropriate counterfactual, we then looked to see if, absent the merger, there were likely to be other buyers whose acquisition of the SeaFrance business or its assets would have produced a better outcome for competition than the merger under consideration.[110] In doing so, we considered how events were likely to have unfolded had GET not purchased the SeaFrance assets.

(c) We assumed that the bidding behaviour of the actual or prospective bidders (other than GET) would not have been different if GET had not taken part on the basis that (i) the sealed bid process gave parties limited information about the identity of other bidding parties and the level of their bids; and (ii) DFDS told us that it did not believe that GET would have been allowed to acquire the vessels on competition grounds, and we think it is reasonable to assume that other actual or prospective bidders would have taken the same view.

5.9 We recognize that there is inherent uncertainty over how events would have been likely to have unfolded had GET not acquired the SeaFrance assets; this is by its

---

[109] ibid, paragraph 4.3.11.
[110] ibid, paragraph 4.3.16.

very nature a hypothetical question. To assist us in carrying out our assessment, we sought the views of the Court regarding the liquidation process. However, the Court considered that it was not permitted to respond to our questions on this issue.[111] Consequently, there is a degree of speculation in assessing the likely actions of the Court had GET not acquired the assets. Nevertheless, we considered it appropriate to take into account the duty of the Court to achieve the best outcome for the creditors of SeaFrance.

5.10 We note that there were other bidders who were interested in purchasing the liquidated assets. As set out in paragraphs 3.12 and 3.13, DFDS/LD made an initial bid of €50 million for the *Berlioz* and the *Rodin*, or €30 million if it could only acquire the *Rodin,* and Stena RoRo made an initial bid of €30 million for the *Rodin,* and DFDS/LD submitted a revised bid of €[✂] million for the *Berlioz*, the *Rodin* and the *Nord Pas de Calais* which was received after the deadline for submission of bids.

5.11 We analysed three potential approaches that might have been followed by the Court and the possible outcomes of each, taking into account the criteria used by the Court to assess the best outcome for creditors in the actual sales process. These were, in summary: the amount of the bid; whether the bid was for all three vessels; whether the bid confirmed that the Vessels would remain under the French flag; and whether the bid preserved employment. (These criteria are set out in more detail in paragraph 3.15).

Approach 1: the Court abandoned the sealed bid process and held a public auction

5.12 We first considered an approach whereby the Vessels were sold by way of public auction. We considered that this was a possibility given that the Court minutes record that the liquidator had requested that if 'an amicable transfer in favour of Groupe

[111] The Court communicated its position to the CC in letters dated 7 January 2012 and 22 January 2012.

Eurotunnel' could not be achieved, the Vessels should be sold by public auction. DFDS told us that DFDS/LD would have participated in an auction process.[112] We consider this to be likely since DFDS/LD had not only bid for the Vessels in the liquidation process but also previously for SeaFrance as a continuing business.

5.13 DFDS told us that it had bid for the *Berlioz* and the *Rodin* because there were not many vessels suitable for use on the Dover–Dunkirk and Dover–Calais routes available for purchase, and the sale of the SeaFrance assets offered a good opportunity to purchase vessels that met the requirements of these routes in terms of speed, operational costs and reliability. DFDS told us that it had entered the Dover–Calais route to strengthen its position on the short-sea crossing because, compared with the Dover–Dunkirk route, Dover–Calais had higher traffic volumes, it was easier to achieve higher utilization levels, operating costs were lower and it supported significantly higher frequency of crossings. We also noted that at the time of its bid for the Vessels, DFDS/LD had already started operations on the Dover–Calais route with the *Norman Spirit* chartered from LD Lines and the *Barfleur* chartered from Brittany Ferries. DFDS told us that if it had acquired the *Berlioz* and the *Rodin* it is likely that the *Norman Spirit* would have been redeployed on to a non-short-sea route and the *Barfleur* would have been returned to Brittany Ferries.

5.14 We consider that it is unlikely that a public auction would have attracted any new bidders who had not come forward in the liquidation process for the following reasons:

(a) other than the bids by DFDS/LD and the SCOP, there were no credible bids for SeaFrance during the receivership;[113]

---

[112] DFDS hearing summary, paragraph 34.
[113] We understand that a company called Being Bang also submitted a bid but it did not have financing in place.

(b) the receivership and subsequent liquidation of SeaFrance was public knowledge, and had been widely reported, so potential bidders would have known of the opportunity to acquire the assets;[114]

(c) a shipbroker had been appointed to assist with the liquidation and made contact with over 40 potential bidders;

(d) the sale process had been publicized on the Internet and Lloyd's List; and

(e) there had been a reasonable period of time for bids to be submitted in the liquidation process and we see no reason to believe that other bidders would have come forward in a public auction.

5.15 Had the Court taken this approach, we consider that DFDS/LD would have been the most likely purchaser of the Vessels, given that it had a strong commercial reason to acquire the Vessels and its revised bid demonstrated its willingness to offer more than any other bidder who had shown interest in acquiring them in the liquidation process (other than GET). We also considered that DFDS/LD would have operated the *Berlioz* and the *Rodin* on the Dover–Calais route in conjunction with the three vessels it operated on the Dover–Dunkirk route.[115]

Approach 2: the Court considered only the initial sealed bids

5.16 The second approach we considered was one in which the Court took into account only the initial sealed bids placed before the deadline.

5.17 Considering only these initial bids, it appears that a combination of DFDS/LD's bid for the *Berlioz* of €30 million and Stena RoRo's bid for the *Rodin* of €30 million would have produced the highest gross proceeds of €60 million. However, taking into

[114] A London-based shipbroking firm confirmed to us that the Vessels had been widely marketed by the shipbroking firm appointed by the court and it believed that all prospective buyers would have been aware of the sales process.

[115] DFDS told us that if it had acquired the *Berlioz* and the *Rodin*, it planned to use them on either the Dover–Calais route or the Dover–Dunkirk route in replacement for the *Norman Spirit* and *Barfleur*. The acquisition of the *Berlioz* and the *Rodin* would have give DFDS/LD five interchangeable vessels which it could have used on either route and two or three would have been used on each route depending on demand. For simplicity, in this section we assume that if DFDS/LD had acquired the *Berlioz* and the *Rodin*, it would have operated them on the Dover–Calais route.

account the Court's criteria for evaluation of the bids, we consider that it may have had concerns with this combination of bids. This is because Stena RoRo told us that it did not have any plans to operate the *Rodin* itself and did not have any plans to enter the short-sea market, and had its bid been successful, it would have either sold the *Rodin* on the open market or sought to charter it to another ferry operator around the world.

5.18 We considered that the implications of Stena RoRo's intention to sell or charter the *Rodin* for use in another market were:

(a) It is more likely than not that the *Rodin* would have ceased being operated under the French flag and, as noted by the receiver, this might have triggered a substantial tax cost to the liquidator, and as a result might have made the Stena RoRo bid unattractive to the Court as it sought to maximize proceeds for the creditors.

5.19 If the Court had sought undertakings from Stena RoRo similar to that which it obtained from GET requiring GET not to transfer the Vessels for a period of five years after the acquisition, Stena RoRo may not have been prepared to give such undertakings.

(a) There would have been no prospect of employment on the *Rodin* for the ex-SeaFrance employees.

5.20 In view of these concerns, we consider that the court may have preferred DFDS/LD's bid of €50 million for the *Berlioz* and the *Rodin* would have been preferred. This bid may have produced the highest value for creditors because DFDS/LD planned to operate the vessels under the French flag and therefore would not have triggered any tax liability. In addition, had the Court required DFDS/LD to enter into undertakings not to transfer the vessels, we consider that it is likely that DFDS/LD

would have been willing to enter into such undertakings because it planned to operate the vessels itself rather than sell or charter them to another operator. Further, DFDS/LD's bid had some prospect of meeting the Court's criteria for preserving opportunities for employment, because DFDS/LD planned to use the vessels on the short sea (see paragraph 5.25).

5.21 We consider that an alternative possibility is that the Court would have allowed the Stena RoRo bid for the *Rodin* had Stena RoRo chartered the *Rodin* to DFDS/LD if this would have avoided the tax charge associated with the reflagging of the vessels.

5.22 In our view, had DFDS/LD acquired both vessels, it is likely that it would have operated them both on the Dover–Calais route. This same result is likely to have occurred if DFDS/LD had acquired the *Berlioz* and Stena RoRo had acquired the *Rodin* and chartered it to DFDS/LD. Had Stena RoRo acquired the *Rodin* and deployed it outside the short sea, then it is likely that DFDS/LD would have acquired the *Berlioz* and operated it on the Dover–Calais route, in combination with one of its existing vessels.

5.23 Therefore, while we were not able to form a view on the decision the Court would have come to, we considered that had the Court adopted this approach, it is likely that DFDS/LD would have operated two ships on the Dover–Calais route, being the *Berlioz* and either the *Rodin* or one of its existing chartered vessels.

Approach 3: the Court considered DFDS's revised bid

5.24 The third approach we considered was one in which the Court took into account the revised bid submitted by DFDS/LD for all three vessels, which was submitted after the deadline (see paragraph 3.13).

5.25 Taking into account the criteria used by the Court, it appears likely that the second bid by DFDS/LD would have produced a better outcome for creditors than the other bids, since DFDS/LD's second bid:

(a) was for €[✂] million and therefore it was the highest of the bids submitted to the Court, other than the bid by GET;

(b) was for all three vessels and therefore the only bid, other than the bid by GET, which would have enabled the liquidator to avoid any future maintenance expense on the *Nord Pas-de-Calais*;[116]

(c) would have kept the Vessels under the French flag (DFDS told us that DFDS/LD had committed to the Court that it would operate the *Berlioz* and the *Rodin* under the French flag); and

(d) if successful, might have offered some employment opportunities for ex-SeaFrance employees on either the *Berlioz* or the *Rodin* as DFDS told us that it was likely that these two vessels would have replaced the the *Norman Spirit* and the *Barfleur* which it was already operating on the Dover–Calais route.[117] DFDS told us that the *Norman Spirit* would have been redeployed on to a non-short-sea route and the *Barfleur*, which it chartered from Brittany Ferries, would have been returned to Brittany Ferries and the crew transferred to either the *Berlioz* or the *Rodin*.

5.26 Therefore, our preliminary view is that under this approach DFDS/LD was the most likely purchaser of the Vessels, and that DFDS/LD would have used the *Berlioz* and the *Rodin* on the Dover–Calais route. We reached this view because DFDS/LD's second bid represented a better outcome for creditors when assessed against the

[116] DFDS told us that its second bid included the *Nord Pas-de-Calais* because an offer for all three vessels was expected to be more attractive to the Court than an offer only for the *Berlioz* and the *Rodin.* However, it would not have operated the *Nord Pas-de-Calais* on the short-sea crossing because of its age and because it was a freight-only ferry, and that it probably would have been scrapped.

[117] DFDS told us that the *Berlioz* and the *Rodin* had more passenger capacity than the vessels they would have replaced but similar freight capacity.

Court's criteria than the initial sealed bids by DFDS/LD and Stena RoRo (either singly or in combination).

Provisional conclusions

5.27 Having considered three potential approaches that might have been available to the Court, and our views on these approaches set out in paragraphs 5.15, 5.23 and 5.26, our provisional conclusions are that under each approach DFDS/LD would have been likely to have acquired the *Berlioz* and may have also acquired the *Rodin*, and that the appropriate counterfactual is that DFDS/LD would have operated two vessels on the Dover–Calais route in conjunction with three on the Dover–Dunkirk route. As the three approaches we have considered do not make a material difference to our assessment of the counterfactual, we consider that further detailed investigation of the counterfactual is not required.[118]

6. Market definition

Introduction

6.1 The purpose of market definition is to provide a framework for the CC's analysis on the competitive effects of the merger. The relevant market (or markets) is the market within which the merger may give rise to an SLC. It contains the most significant competitive alternatives available to the customers of the merger companies and includes the immediate determinants of the effects of the merger. However, market definition is not an end in itself, and the boundaries of the market do not determine the outcome of the CC's analysis of the competitive effects of the merger in any

[118] *CC2*, paragraph 4.3.6: When it considers that the choice between two or more scenarios will make a material difference to its assessment, the CC will carry out additional detailed investigation before reaching a conclusion on the appropriate counter-factual.

mechanistic way. The CC may also take into account constraints outside the relevant market (or markets).[119]

6.2 In line with normal practice, we examine in this section two dimensions of market definition:

(a) the product dimension (paragraphs 6.3 to 6.16); and

(b) the geographic dimension (paragraphs 6.17 to 6.32).

Product market

6.3 Eurotunnel transports passengers and freight separately in specially designed shuttle carriages. Both passengers and freight are transported with their vehicles.[120]

6.4 Ferry operators often carry both freight and passengers on the same vessels, although some vessels are purpose-specific. Ferry operators offer freight services for unitized freight[121] that can be carried on roll-on/roll-off vessels (ro-ro) or lift on/lift off (lo-lo) vessels. Freight transported on lo-lo vessels is containerized. Freight transported on ro-ro vessels can be either accompanied, with the trailer crossing together with the road tractor and driver, or unaccompanied with the trailer crossing independently of the road tractor and driver. Ferries operating between Dover and Calais are all ro-ro vessels and over 95 per cent of freight is accompanied.

6.5 GET submitted that:

(a) There were distinct markets for freight and passenger transport services.

(b) Lo-lo ferries, accompanied and unaccompanied ro-ro ferries, and the Channel Tunnel shuttle services for the transport of freight were all part of the same market.

---

[119] *CC2*, paragraphs 5.2.1 & 5.2.2.
[120] Initial submission, Appendix 12 (1), and First Day Letter Initial Factual Submission (Annex C).
[121] Freight which is stored in various standardized forms such as driver-accompanied vehicles, unaccompanied vehicles and containers.

(c) Low-cost airlines, Eurostar, Eurotunnel services and ferries for the transport of passengers, represented a competitive constraint that should be fully taken into account.

6.6 GET's internal documents give some indication of the company's perception of competitive constraints and therefore can assist in defining the economic market or markets in which it operates. We noted that documents prepared by the Passenger division of Eurotunnel refer to the 'Short Straits' market and that the division monitors the prices of short-sea ferry competitors. Air travel is listed on occasions in the Passenger division's papers, and as part of the analysis of the wider environment. GET told us that the wider constraints affected customer choice, but they were not taken into account when setting prices. [✂]

6.7 DFDS considered that the market for freight transport should include all modes of transportation by sea and train. For passenger transport, the relevant product market comprised all of the existing means of transportation between England and Continental Europe, for both 'tourist' as well as 'business' passengers, given the decline of air transport prices over the last several years. DFDS also acknowledged the viability of assessing competition on the basis of a short-sea maritime transport market, on the basis that air transport was not a viable alternative for those passengers wishing to take their own vehicles with them.

6.8 P&O did not think that it operated in the same market as low-cost airlines or Eurostar rail services, though there was some degree of competition for shares of the 'leisure

pound'. For tourists, it considered that the market which the tunnel and ferry operators focused on were the transportation of passengers with vehicles.[122]

Freight versus passenger markets

6.9 The assets operated by GET and its primary competitors consist of ferries and shuttles which provide transport services between the UK and Western Europe. Prior investigations of these markets by the OFT and the CC have distinguished between freight and passenger transport services.[123] This is because there are significantly different demand- and supply-side considerations for the two markets. On the demand side, the two groups of customers have very different requirements for transport services. For example, freight customers are generally intermediaries providing transport and logistics services that operate in a business to business environment and have relatively stable demand over the year. Passenger customers, on the other hand, often travel for leisure and have a highly seasonal demand pattern. On the supply side, most of the ferry services on the short sea are based on ro-ro operations with either some or a large degree of flexibility to supply either freight or passenger demand. However, there are specialized providers of ferry services to freight customers, and the modes of transport available to freight and passenger customers differ significantly.[124] These issues are analysed in more detail below.

6.10 The above factors indicate that the competitive effects analysis should distinguish between the freight and passenger markets. This is also in line with the submissions of the parties and with previous decisional practice.

---

[122] P&O third party hearing.
[123] The most recent OFT cases include DFDS/LD, 7 August 2012: (www.oft.gov.uk/shared_oft/mergers_ea02/2012/DFDS.pdf); DFDS/Norfolk (http://ec.europa.eu/competition/mergers/cases/decisions/M5756_20100617_20212_802533_EN.pdf), 17 June 2010; CC Stena/DFDS, 29 June 2011 (www.competition-commission.org.uk/assets/competitioncommission/docs/2011/stena-dfds-merger-inquiry/stena_dfds_final_report.pdf).
[124] For example, freight operators have the choice of various modes within the ferry market (lo-lo and ro-ro accompanied or unaccompanied) whereas the options available to passengers are quite different.

Freight: substitution from accompanied to unaccompanied services (ro-ro)

6.11 Switching from accompanied to unaccompanied operation implies switching from an operation where the driver travels with the vehicle on the ferry crossing to one where the trailer is left at the port of departure, and then picked up by another tractor unit and driver at the destination port.

6.12 Large freight customers we spoke to indicated that for some customers this might not be difficult, but for others it would not be a readily viable option. For example, it was noted that many of the European hauliers driving into the UK did not have a domestic operation in the UK from which to supply tractor units and drivers to pick up or drop off unaccompanied trailers on the UK side of the crossing.[125]

Freight: substitution from ro-ro to lo-lo

6.13 The 'lo-lo' mode of transport involves unloading containerized freight from the haulage vehicle at the port of origin and then loading on to a ferry suitable for transporting containers without trailers. At the port of destination, the container will be offloaded from the ferry, and ultimately uplifted by another haulage vehicle. Lo-lo services require specialized equipment (in particular, container cranes) that are not required for ro-ro operations.

6.14 Large freight customers told us that switching to lo-lo was not a viable option on the short sea and that it was not easy to switch to that mode of transportation. One customer told us that it had considered switching to lo-lo but had found that service frequency and transit times did not meet its requirements and it had incurred significant costs when conducting trials. Another customer commented that lo-lo was a specialist business.

[125] Third-party customer hearing.

Passengers: evidence on intermodal competition

6.15 We analysed data from Ferrystat[126] to understand the travel choices that passengers have been making and the extent to which these choices have had an impact on Eurotunnel and ferry services between the UK and the continent. The statistics showed that:

(a) As well as being the predominant mode of travel, air travel had grown strongly over the last decade up until the time of the financial crisis, at which point it fell sharply and is only recently recovering to the levels of 2004.

(b) Despite strong economic growth (prior to the economic crisis in 2008) and an expanding population in the UK, the total number of passengers crossing the channel by ferry and Eurotunnel over the last decade has declined overall, with periods of decline being interrupted by years of modest growth or relatively little change.

(c) Passenger rail travel (by Eurostar) has shown steady growth over most of the last decade and of the three modes of transport is the only mode not to have recorded a significant fall in traffic between 2008 and 2009.

(d) The reasons why short-sea travellers prefer the ferry, Eurotunnel or rail travel (by Eurostar) over flights include the independence of driving their own cars, flexibility in timings, favourable pricing and lack of luggage restrictions, among others.[127]

6.16 Overall, the data is consistent with the view that the total volume of passenger demand is influenced by macroeconomic and demographic trends, and interacts at the margin with consumer trends that include, to a certain extent, movement towards (and more recently away from) options such as air travel. However, the data also

[126] The statistics include: the volume of passenger journeys taken on ferry services between the UK and Western Europe; on Eurotunnel; on Eurostar and by air between the UK and Western Europe for the period from 2003 to 2011; surveys of travellers asking the reasons why passengers prefer rail/ferry over air travel. Source: Ferrystat April 2012.

[127] Continent Ferry Survey. The survey asks ferry, Eurotunnel and rail passengers about their reasons for choosing rail or ferry over flying. The passengers' answers to all questions were then allocated to the mode of transport last taken. The aggregated answers therefore do not map exactly on to the most recent mode of travel. For example, a customer who last travelled on Eurostar will be classified as a rail passenger, but may indicate that ability to take their own car is one of the reasons for not flying.

shows that despite significant changes in the usage of alternative travel modes and major negative macroeconomic shocks, the overall level of passenger demand for ferry services has been relatively stable. In addition, the reasons given by passengers for preferring ferry, Eurotunnel or rail travel over air travel suggest that there will be limited substitutability between short-sea crossings and air travel for many passengers. These observations are consistent with GET's view of the market as expressed in its internal documents.[128]

Geographic market

6.17 As explained in paragraph 2.1, Eurotunnel's services link Folkestone in the UK to Coquelles in France. MFL provides services between Dover and Calais. The Dover–Calais and Dover–Coquelles routes are part of a group of routes crossing the English Channel that are referred to as the 'short sea' or 'short straits' (defined in the footnote to paragraph 3.14).

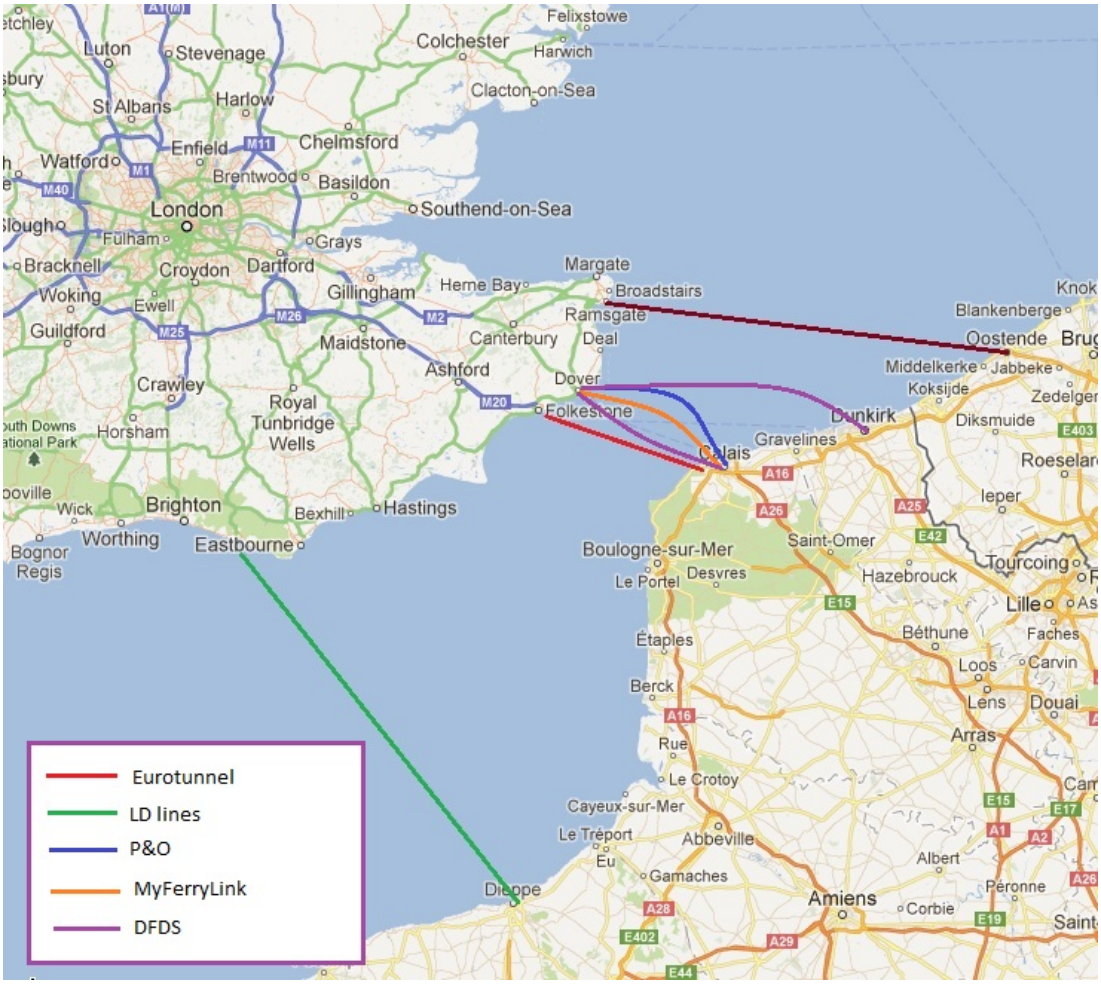
6.18 Figure 1 below illustrates the boundaries of the 'short sea'. The north-eastern boundary is defined by the Ramsgate–Ostend route, while the western boundary is defined as being at the Newhaven–Dieppe route. The boundary points are relatively arbitrary but are not particularly critical, as traffic on the boundary routes is small, accounting for only less than 4 per cent of volume on the short sea.[129] The main competitors with significant business volumes which operate on the flanking routes to the short sea are Stena line, which operates from Harwich to the Hook of Holland, DFDS (Felixstowe–Rotterdam), Cobelfret (London to Belgium and Holland), P&O which has a limited volume service from Tilbury to Zeebrugge, and Brittany Ferries which operates a number of Western Channel routes, the most significant of which is Caen–Portsmouth.

---

[128] See paragraph 6.6 above.
[129] DfT UK Port Freight Statistics 2011.

FIGURE 1

Short-sea routes



Source: Operators.

6.19 GET submitted that the relevant geographic market was wider than the short sea, including the Western Channel which comprised routes between ports on the south coast of England and ports on the north coast of France and the North Sea, which comprised routes between the ports on the east coast of England and ports in Belgium and the Netherlands.

6.20 We reviewed documents prepared by Eurotunnel's Passenger and Truck divisions, as they could be indicative of the company's view of where the boundaries of the market or markets it operates in lie. We noted that:

(a) In the case of the Passenger division, the documents refer to the 'Short Straits' market.

(b) [✂] in respect of both divisions. The Truck division also monitors [✂]. Similarly, market shares are calculated on the basis of a short-sea market.

6.21 P&O told us that in relation to passenger services, it did not consider the North Sea and Western Channel routes to be in the same market as the short-sea routes. This was because the destinations served by these routes were distant from the short-sea ports. P&O did not monitor activity on the Western Channel routes, as it was no longer active in that geographic sector. It did monitor competitive activity on the North Sea but only because it was itself active on North Sea routes. In the freight market, routing choices were decided upon through modelling (considering driving miles and cost of crossing, for example). P&O thought that there was a wider range of options for shipping to the UK available for freight shipments travelling from further away, as there were more options for routings.

6.22 The CC notes and agrees with GET's submission that the question is one of substitution at the margin, and whether there is evidence of material customer switching in response to small changes in the relative attractiveness of the services available on different routes. Our approach to this question has been to look for evidence of actual substitution across routes in our 'event analysis' (see Appendix C) and to look for evidence of similar pricing trends across routes in our 'price analysis' (see Appendix D). We discuss this evidence further in paragraphs 6.28 to 6.32 below.

Capacity

6.23 Most ferry crossings to the Continent are carried on the short sea. Table 2 shows that including Eurotunnel, short-sea freight capacity is 68 per cent (measured in 'feu' or 40-foot equivalent units) of total freight capacity across the short sea, Western

Channel and North Sea. For accompanied traffic only, the short sea contributes about 83 per cent of capacity.[130] UK–Continent traffic statistics from the Department for Transport (DfT) present a similar picture, with 65 per cent of total traffic transported through the short sea and 87 per cent for accompanied traffic only.[131]

TABLE 2 **Freight capacity by region, 2010**

feu

	Short-sea Eurotunnel	*Short-sea ferries*	*Western Channel*	*North Sea*
Ro-ro accompanied	1,493,881	3,625,520	348,475	702,776
Ro-ro unaccompanied				1,162,565
Lo-lo				224,889
Total	1,493,881	3,625,520	348,475	2,090,230
% of total	19.8%	48.0%	4.6%	27.7%

Source: PRB Associates.

Transport costs

6.24 For freight operators, a factor in deciding whether to switch routes is the likelihood that changing route would involve driving additional road miles. Heavy freight vehicles have significant operating costs that are distance related. This fact was reflected in the presentation to the CC by GET during its site visit, which noted that one of the reasons that Eurotunnel can sustain a premium price over ferries is because the Folkestone location saves 'almost 20km in time and money, an estimated €[✂] direct saving per crossing (driver hours & fuel costs)' when compared with driving to or from Dover. This reflects a cost of driving in the region of €[✂] per kilometre. Major freight customers also told us that the Eurotunnel premium largely reflected cost differences related to the time and distance savings associated with Eurotunnel's Folkestone entry point.

[130] 2010 Report by PRB Associates. Freight traffic on routes to Spain/Portugal, beyond Bristol on the Western Channel and beyond Manchester in the North Sea are excluded.
[131] DfT Statistics 2011. Short-sea data includes Eurotunnel and Ramsgate but not Newhaven. Western Channel includes all ports on the south coast, west of Folkestone. North Sea includes all ports on the east coast, north of and including the Thames estuary.

6.25 [✂] A hypothetical increase in price of [✂] post-merger would therefore imply an increase in price of approximately €[✂]. This suggests that an increase in price of this scale would justify at most driving an additional [✂] kilometres (less than 10 miles) in search of a lower-cost crossing option, even assuming that there were no other additional costs associated with using the alternative routes (such as fewer crossings increasing total journey time). Compass Lexecon reported academic studies suggesting that the value of time for freight in Western Europe was in the order of €17/hr. This suggests that switching to routes with fewer crossings in response to a significant non-transitory increase in prices would be unattractive if the hauliers' desired travel time was not already closely aligned with scheduled departures on alternative routes.

Freight customers' evidence

6.26 We received 189 responses to a questionnaire that we sent to 3,119 freight customers. Although not statistically robust, the responses give an indication of freight customers' views on their ability to switch away from the short sea to other routes. We found that in response to a hypothetical price increase on Eurotunnel and short-sea ferries:

(a) 63 per cent of respondents who were either customers of Eurotunnel or a short-sea ferry in 2012 said that they would not divert any volumes if prices on both Eurotunnel and all short-sea ferries went up by 10 per cent.

(b) 21 per cent would divert more than 25 per cent of volumes away from the short sea following the 10 per cent price rise. 16 per cent would divert less than 25 per cent or were not sure how much.

6.27 We held hearings with five freight customers. They identified factors that constrained their ability to switch away from the short sea:

(a) The high frequency of departure on the short sea and short duration of the crossing. One customer stated that 'just-in-time' deliveries were becoming more prevalent, as companies sought to carry less stock.

(b) Driver working hours and remuneration terms: where drivers were paid a fixed rate, longer, cheaper crossings could be more appealing.

(c) The very limited numbers of driver-accompanied slots on the sailings on the North Sea route, which made it difficult to move significant amounts of self-drive trucks away from the short sea to the North Sea.

Event analysis

6.28 We analysed the movement in the volume of passenger and freight traffic over time. We found that the short sea has been gaining share of freight volume over time when compared with the North Sea and Western Channel routes. The Western Channel in particular appears to be in steady decline. For both freight and passengers, the short sea accounts for the majority of traffic.

6.29 To understand the extent to which short-sea routes are substitutable with more remote routes, we examined movements in traffic that followed three events that significantly altered the nature of supply on the short sea since 2008: a fire that resulted in the closure of the tunnel in September 2008; a strike that affected SeaFrance services in March 2008; and the exit of SeaFrance in November 2011, followed by the launch of the DFDS Dover–Calais service in February 2012.

6.30 Starting with the fire, we observed that this event coincided with the economic downturn. Our analysis showed that the fall in freight traffic that occurred on the short sea at that time was primarily caused by a general fall in demand for freight transport, which was likely to have resulted from the economic downturn, rather than substitution to other routes. This was further reinforced by the observation that freight

volumes on the North Sea and Western Channel also fell over this period. Similar trends could be observed for passenger traffic. The evidence also suggested that all the freight volumes diverted from Eurotunnel benefited ferry operators and remained virtually exclusively on the short sea. The other two events similarly appeared not to have resulted in any material movement of freight traffic to routes outside of the short sea (see Appendix C, paragraphs 13 to 30).

Pricing analysis

6.31 We examined average yearly prices charged to freight customers by Eurotunnel, and ferries operating on the short sea, Western Channel and North Sea. We noted that the pricing trend in the short sea has been quite different from that of the North Sea and Western Channel. Short-sea ferry prices have decreased steadily since 2008, whereas North Sea and Western Channel prices have increased over time. This observation is inconsistent with the North Sea and Western Channel being in the same economic market as the short sea.[132]

6.32 Similarly, we note that the trends in pricing to passengers in the short sea have been quite different from that of the North Sea and Western Channel. Short-sea ferry and tunnel prices have been stable since 2008, whereas North Sea and Western Channel prices have increased over time. This observation is inconsistent with the North Sea and Western Channel being in the same economic market as the short sea.[133]

Conclusions on market definition

6.33 We have provisionally found that transport services for freight and transport services for passengers are two separate product markets.

[132] If the regions were in the same economic market, price levels might differ, but we would expect price trends to be similar.
[133] If the regions were in the same economic market, price levels might differ, but we would expect price trends to be similar.

6.34 We have provisionally found that the appropriate geographic market in both cases is the short sea.

6.35 We have no evidence that it is possible to switch from an accompanied to an un-accompanied mode of operation on the short-sea routes, but even if it were, it would not protect freight customers from a price rise, as the competitors who supply un-accompanied services are the same as those who supply accompanied services.[134] As well as switching modes, freight customers would therefore also have to switch routes on the North Sea or Western Channel. Given our provisional finding on geographic market definition, we do not need to take a view on whether unaccompanied ro-ro services are in the same market as accompanied ro-ro services.

6.36 Similarly to the case of switching to an unaccompanied mode of operation, switching to lo-lo on the short-sea routes would not protect freight customers from a possible price rise. Rather, the mode switch would need to be combined with a switch in route to a route where lo-lo operation offered a cost advantage,[135] most likely on a North Sea route where lo-lo is more commonly observed.[136] Given our provisional finding on geographic market definition, we do not need to take a view on whether lo-lo services are in the same market as ro-ro services.

6.37 Bringing together the two dimensions of market definition, we provisionally conclude that the relevant markets in which to consider the competitive effects of the merger are:

(a) transport services to passengers on the short sea (the passenger market); and

(b) transport services to freight customers on the short sea (the freight market).

---

[134] If GET were to increase prices post-merger unilaterally, freight customers could switch to competing ferries without the need to change the mode of travel.

[135] On longer North Sea routes, the cost of additional port handling is offset by the saving from not having large numbers of trailer units unutilized during the crossing and in spatial efficiency gains by the ferry operator (ie due to the ability to stack containers, more freight can potentially be carried on a particular sailing).

[136] See Table 2.

7. Nature and evolution of pre-merger competition

7.1 In order to assess the impact of the merger in the relevant markets we have defined above as compared with the counterfactual, it is first important to understand how competition has unfolded in the relevant markets in recent times. In this section, we describe how the relevant markets operate from a demand and supply point of view. In particular, we examine:

(a) how demand has evolved over the last five years (paragraphs 7.2 to 7.8);

(b) how capacity has evolved in recent years, showing in particular the impact of SeaFrance restructuring, the liquidation of its assets, and the subsequent increase in capacity by DFDS, P&O and MFL (paragraphs 7.2 to 7.15);

(c) the approach to competition taken by suppliers on the short sea, including the perception of the various operators of their competitive strength and that of their competitors (paragraphs 7.16 to 7.22) and the nature of negotiations between freight customers and operators (paragraphs 7.26 to 7.32); and

(d) the analysis of the intensity of competition on the short sea (paragraphs 7.33 to 7.53), including relationships between the prices charged by the various suppliers on the short sea and the extent of constraints that the various short-sea routes exert on each other as illustrated by the volume of traffic they carryand also the extent of substitution between routes and services, as evidenced by our events analysis and customer survey.

Demand for transport services and supply on the short sea

7.2 Tables 3, 4 and 5 show that demand for passenger transport services on the short sea declined by an annual rate of 0.1 per cent between 2007 and 2011, although demand for Eurotunnel services increased by 1.6 per cent, while demand for ferry services declined by 1.5 per cent. Demand for freight traffic experienced a more pronounced annual decline of 3.1 per cent over the period. This affected equally the Tunnel and ferries. Demand for passenger transport services appears to be highly

seasonal, with most travel taking place in the summer months and smaller peaks at Christmas, New Year and Easter. In contrast, freight traffic is generally more evenly spread across the year, although there are normally slight dips in demand in August and December.

TABLE 3 **Freight and passenger traffic over time on the short sea**

					'000 vehicles		
	2007	*2008*	*2009*	*2010*	*2011*	*2012 Jan–Oct*	*07–11 CAGR %*
Ferries							
Freight traffic	2,400	2,354	2,340	2,127	2,107	1,662	–3.1
Passenger traffic	2,921	2,914	2,855	2,917	2,754	2,192	–1.5
Tunnel							
Freight traffic	1,415	1,254	769	1,089	1,263	1,228	–2.8
Passenger traffic	2,168	1,938	1,949	2,161	2,307	2,085	1.6

Source: IRN research.

Note: Passengers includes cars only but this accounts for the vast majority of passenger traffic. We excluded Ramsgate–Ostend for which we do not have volume data. This route accounted for, at most, 3.3 per cent of total daily capacity in 2007 to 2010; later its share fell to 1.6 per cent of total daily capacity on the short sea (including Eurotunnel).

7.3 Over the past five years there have been services offered on six different short-sea routes, as shown in Table 4. Freight traffic is primarily carried on three of these routes: on the Folkestone–Coquelles route (in the tunnel), on the Dover–Calais route, and on the Dover–Dunkirk route. Short-sea freight traffic has declined across all three key routes in the 2007 to 2011 period.

TABLE 4 **Freight traffic by short-sea route**

					'000 vehicles		
	2007	*2008*	*2009*	*2010*	*2011*	*2012 Jan–Oct*	*07–11 CAGR %*
Folkestone–Coquelles	1,415	1,254	769	1,089	1,263	1,228	–2.8
Dover–Calais	1,847	1,773	1,767	1,583	1,601	1,184	–3.5
Dover–Dunkirk	518	536	517	452	468	443	–2.5
Dover–Boulogne	-	-	16	53	-	-	N/A
Dover–Dieppe	-	-	2	-	-	-	N/A
Newhaven–Dieppe	36	45	37	38	38	34	1.4
Total short sea	3,816	3,608	3,108	3,215	3,370	2,889	–3.1

Source: IRN research.

Notes:
1. Excludes Ramsgate–Ostend for which we do not have volume data. This route accounted for, at most, 3.3 per cent of total daily capacity in 2007 to 2010; later its share fell to 1.6 per cent of total daily capacity on the short sea (including Eurotunnel).
2. N/A = not applicable.

7.4 Passenger traffic has been generally flat on the short sea in the period from 2007 to 2010. One route, Dover–Dunkirk, has, however, experienced significant growth and the traffic through the tunnel has increased moderately.

TABLE 5 **Passenger traffic by short-sea route**

					'000 vehicles		
	2007	*2008*	*2009*	*2010*	*2011*	*2012 Jan–Oct*	*07–11 CAGR %*
Folkestone–Coquelles	2,168	1,938	1,949	2,161	2,307	2,085	1.6
Dover–Calais	1,953	1,898	1,838	1,885	1,810	1,448	–1.9
Dover–Dunkirk	573	691	802	850	859	667	10.7
Dover–Boulogne	311	243	138	100	-	-	N/A
Newhaven–Dieppe	84	83	77	82	86	79	0.6
Total short sea	5,089	4,853	4,804	5,078	5,062	4,279	–0.1

Source: IRN research.

Notes:
1. Cars only.
2. Excludes Ramsgate–Ostend, for which we do not have volume data. This route accounted for, at most, 3.3 per cent of total daily capacity in 2007 to 2010; later its share fell to 1.6 per cent of total daily capacity on the short sea (including Eurotunnel).
3. N/A = not applicable.

7.5 Between January and October 2012, the tunnel accounted for over 40 per cent of freight traffic and almost 50 per cent of passenger car traffic, and its share of traffic increased both in 2011 and 2012. Dover–Calais and Dover–Dunkirk ferry services accounted for 41 and 15 per cent of freight traffic respectively, and for 34 and 16 per cent of passenger traffic respectively. The level of traffic on other routes is negligible and declining.

TABLE 6 **Proportion of short-sea traffic represented by key routes**

						per cent
	2007	*2008*	*2009*	*2010*	*2011*	*2012 Jan–Oct*
Freight traffic						
Folkestone–Coquelles	37	35	25	34	37	43
Dover–Calais	48	49	57	49	48	41
Dover–Dunkirk	14	15	17	14	14	15
Other	1	1	2	3	1	1
Passenger traffic						
Folkestone–Coquelles	43	40	41	43	46	49
Dover–Calais	38	39	38	37	36	34
Dover–Dunkirk	11	14	17	17	17	16
Other	8	7	4	4	2	2

Source: IRN research.

7.6 In 2011, six operators were active on the short sea: P&O (Dover–Calais), SeaFrance (Dover–Calais), DFDS (Dover–Dunkirk), Transmanche Ferries/LD Lines (Newhaven–Dieppe), Transeuropa (Ramsgate–Ostend) and Eurotunnel (Folkestone–Coquelles).

7.7 Following the exit of SeaFrance in November 2011 and the subsequent entry of DFDS and launch of MFL (see Section 2), there are now three ferry operators (including P&O) on the Dover–Calais route for the first time since 1995 (the year following the opening of the tunnel).

7.8 Table 7 shows market shares in revenue terms in January to October 2012 (excluding the minor short-sea routes). Eurotunnel's share of revenue is higher than that of volume across both freight and passengers.[137]

TABLE 7 **Market shares by revenue, freight and passenger traffic on the short sea, January to October 2012**

per cent

Operator	*Passenger revenue share*	*Freight revenue share*	*Total revenue share*
Dover–Calais (DFDS)	[✂]	[✂]	[✂]
Dover–Calais (P&O)	[✂]	[✂]	[✂]
Dover–Calais (MFL)	[✂]	[✂]	[✂]
Dover–Dunkirk (DFDS)	[✂]	[✂]	[✂]
Short-sea ferries	[✂]	[✂]	[✂]
Eurotunnel	[✂]	[✂]	[✂]

Source: Operators, CC calculations.

Capacity and its utilization

7.9 There are inherent difficulties in estimating the level of capacity and capacity utilization in this industry for three key reasons:

(a) As explained in paragraph 7.2, demand from passengers is highly seasonal. There are also daily and weekly peaks.

(b) It is difficult to construct exactly comparable measures of capacity across the different operators. This is both because the operators have different approaches

[137] Excluding SeaFrance, for which we do not hold revenue data.

to tracking capacity internally, and because the different vessels and modes (tunnel/ferry) differ in their ability to adapt marginal capacity so as to switch between freight and passenger capacity.

(c) As is the case in other transport sectors, the aggregate level of capacity utilization is endogenous: for a given level of assets, capacity can be expanded or contracted by adding or removing sailings or shuttle journeys.

7.10 For these reasons, in assessing the level of capacity and its utilization, our starting point and an important source of evidence is the perception of industry players:

(a) Referring to the level of capacity since 2006, P&O told us that the short-sea market has experienced significant excess capacity. It added that the exit of four vessels of SeaFrance was not sufficient to remove this excess capacity (even in the absence of any subsequent addition of capacity).

(b) DFDS told us that this market had been characterized by overcapacity due to the SeaFrance situation where SeaFrance had simply maintained capacity that was not viable.

(c) GET told us that ferry operators currently held sufficient excess capacity to accommodate the increase in market size and additional customer switching. Ferry companies could also further increase capacity without incurring capital investment by running more crossings with their current vessels, and could also easily expand capacity yet further (eg by chartering further vessels).

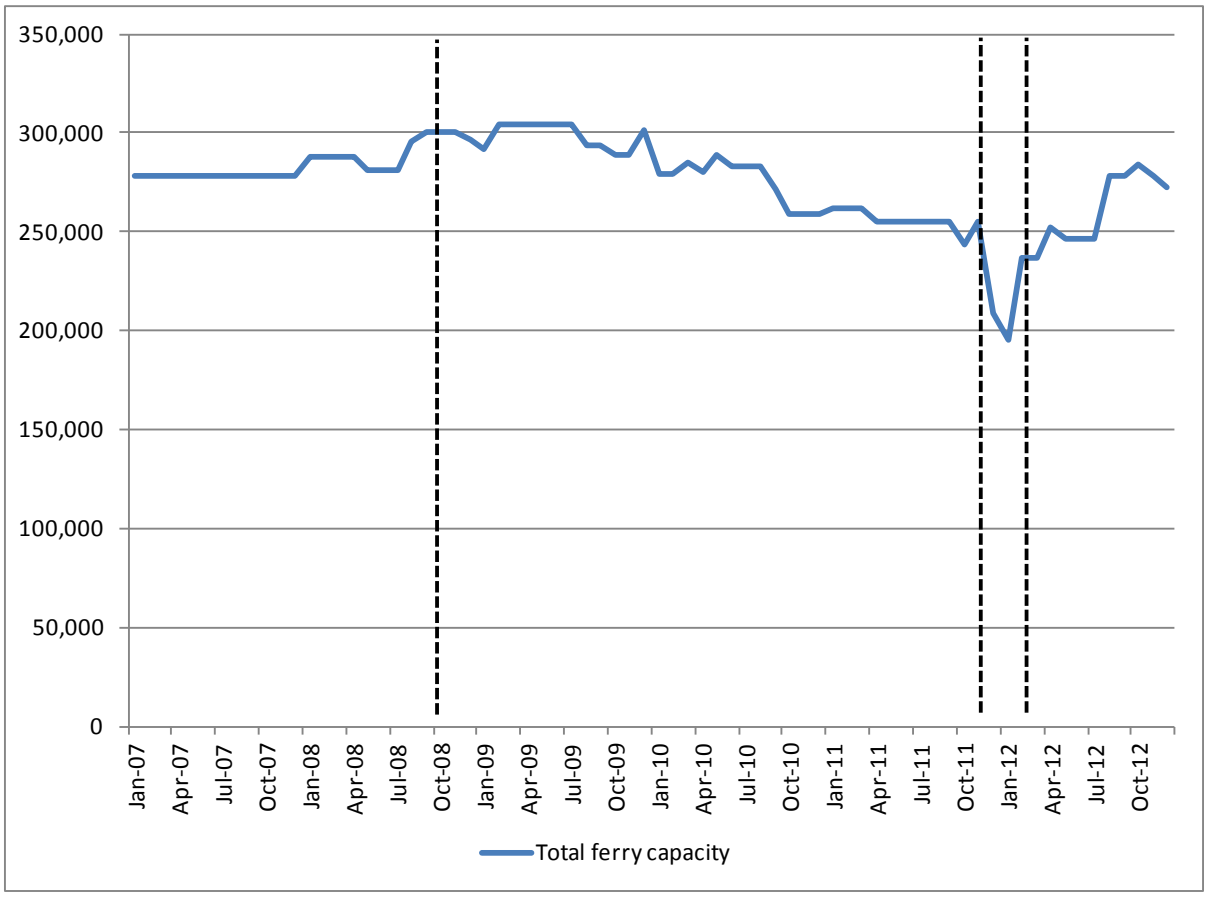
7.11 We also carried out our own calculations, using data provided by the operators. Daily available capacity is calculated by combining the total number of lane metres[138] available on the fleet of each ferry operator with the number of crossings that are being operated. We note that due to its short length, the Dover–Calais route permits

[138] A unit of deck area for ro-ro ships. A lane is a strip of deck 2 metres wide. A lane metre is an area of deck one lane wide and 1 metre long, that is, 2 sq metres (www.unc.edu/~rowlett/units/dictL.html–accessed on 10 January 2013).

a greater number of crossings per day for any given ship and therefore greater daily capacity for any given ship than other short-sea routes, including Dover–Dunkirk. Figure 2 shows our estimates of total daily capacity of the ferries in the short sea.[139]

FIGURE 2

Total daily capacity of ferry operators on the short sea, lane metres per day, 2007 to 2012



Source: Operators, CC calculations.
Note: The first vertical dotted line indicates the tunnel fire; the second dotted line, the exit of SeaFrance, and the third one, the entry of DFDS on the Dover–Calais route.

7.12 Figure 3 shows the analysis of daily capacity by short-sea operator. We have included Eurotunnel for comparison purposes, but assumed constant frequencies of shuttles throughout a given year.

[139] P&O in its response to our questionnaire estimated the capacity of *Spirit of Britain* and *Spirit of France* as [✂] lane metres, excluding 'cars-only' space. We found this estimate to be too low compared with vessels of other operators. For example, *Spirit of Britain* and *Spirit of France* can accommodate 180 HGVs each, which is 50 per cent more that *Delft Seaways* can fit with its [✂] lane metres of capacity, which seems inconsistent and makes it difficult to compare capacities of different operators. Therefore we used the same publicly available data for capacities of all vessels: www.ferry-site.dk, which seems to reflect relative capacities of the vessels more consistently.

FIGURE 3

Daily capacity of ferry operators on the short sea, lane metres per day, 2007 to 2012

[✂]

Source: Operators, CC calculations.
Notes:
1. For Eurotunnel, we assumed constant capacity within each year, taking total yearly capacity from Compass Lexecon calculations and dividing it by 365.
2. The first vertical dotted line indicates the tunnel fire; the second dotted line, the exit of SeaFrance; and the third one, the entry of DFDS on the Dover–Calais route.

7.13 Figures 2 and 3 show that:

(a) In the course of 2010, the level of capacity on the short sea was significantly reduced to around 250,000. This corresponds to the period during which SeaFrance attempted to restructure its operation, in particular by selling two of its six ships and reducing staffing levels (see paragraph 2.8). It also corresponds to the closure of the LD Lines Dover–Boulogne service, and the reduction of the Transeuropa Ramsgate–Ostend service.

(b) The lost SeaFrance capacity following its closure was broadly compensated by an increase in the level of capacity operated by P&O[140] and the launch of DFDS's Dover–Calais route.

(c) Following the launch of MFL, the level of capacity returned to a level that is similar to that available in the period prior to SeaFrance's restructuring.

7.14 Generally, we observe that the level of available spare capacity depends on the quality of service that a given operator decides to provide. GET told us that statistics for Eurotunnel's business on the relationship between load factors and freight traffic transit time show that when the load factor exceeds [✂] per cent on Eurotunnel's shuttles, freight customers experience a lengthening of their transit time, with a decreasing proportion of traffic achieving a transit time below [✂] minutes. Taking into account the limitation that this places on the calculation of capacity estimates,

[140] Launch of a new ferry, the *Spirit of France*, in February 2012 and return of the *European Seaways* into service.

analysis provided to us by Compass Lexicon showed that Eurotunnel's load factors were generally higher than those of ferries but still below what GET considered to be the maximum load it considered to be acceptable.

TABLE 8 **Load factor, 2007 to 2011**

per cent

Operator	*2007*	*2008*	*2009*	*2010*	*2011*
Eurotunnel	[✂]	[✂]	[✂]	[✂]	[✂]
P&O*	[✂]	[✂]	[✂]	[✂]	[✂]
DFDS—Dover–Dunkirk	[✂]	[✂]	[✂]	[✂]	[✂]
SeaFrance	[✂]	[✂]	[✂]	[✂]	[✂]

Source: Data accompanying Compass Lexecon 'Critical loss' paper, provided by GET; ferry operators' historical data on frequency of sailings and capacity of ships.

Notes:
1. Calculations account for both passenger and freight traffic. Load factor is calculated as a ratio of total utilized space (by both passengers and freight) to total available space in lane metres. Utilized space is calculated as number of freight units times 16.5 lane metres, plus number of cars times 2.4 lane metres, plus number of coaches times 7.2 lane metres (these assumptions were used in Compass Lexecon 'Critical Loss Analysis' paper). Number of cars, coaches and freight vehicles transported are taken from IRN research data. DFDS informed us that it uses different assumptions: [✂] lane metres for a freight vehicle, [✂] lane metres for a car, and[✂] lane metres for a coach (email from 15 February 2013). Under these assumptions, DFDS capacity utilization on Dover–Dunkirk route has been [✂] per cent in 2007 to 2011.
2. In its submission to OFT, P&O estimated its capacity utilization at [✂] per cent in 2008, [✂] per cent in 2009, [✂] per cent in 2010, [✂] per cent in 2011, and[✂] per cent in the first half of 2012.

7.15 We note that in 2009, SeaFrance experienced levels of capacity that were well below those of P&O and that the situation improved in 2010, with its load factor reaching 48 per cent in that year. By 2011, its load factors were similar to those of its ferry competitors and overall the ferry operators appeared to be operating at a level that was similar to that in 2007.

Approach to competition

Positioning of the key operators

7.16 We asked GET, P&O and DFDS each to identify its main competitors on the short sea, as well as the strengths and weaknesses of those competitors.

7.17 GET told us that Eurotunnel's approach to competition is based on the benefits of the differentiated service it offers to customers, in particular the speed, ease and reliability of its service, as well as the cost savings available to freight operators due to the extra mileage between the port of Dover and Folkestone on the way to/from

the London area. GET told us that in order to recover its lost custom after the 2008 fire (see paragraph 7.37 below), it undertook a number of measures: [✂]. GET said that none of these activities were targeted at any particular ferry operator, but all these activities had contributed to bringing Eurotunnel's share back to pre-fire levels during 2011.

7.18 GET told us that the actions taken by ferry operators to induce Eurotunnel customers to switch had mainly been focused on increasing the price difference between Eurotunnel and the ferries, and there had also been an increase in ferry operators' capacity. GET suggested that Eurotunnel had endeavoured where possible to adapt its own prices to retain volume and prevent customers from switching, and that freight customers would regularly play off Eurotunnel and ferry operators against each other, switching demand (or threatening to do so) as part of price negotiations. GET told us that P&O and DFDS had a competitive advantage over Eurotunnel and MFL because they were able to offer 'land-bridge'[141] packages to freight customers, offering them rates and route packages between Continental Europe and the UK and the Republic of Ireland.[142] GET also referred to DFDS's ability to bundle short-sea routes with North Sea and Western Channel routes.

7.19 [✂] It believed that its reputation for reliability across its network did work to its advantage on its short-sea routes. It considered that the Dover–Dunkirk service that it offered was particularly appealing to traffic heading to or from the north-east on the European Continent.

7.20 DFDS identified Eurotunnel and P&O as strong competitors, MFL as a strong potential competitor, and TransEuropa as a weak competitor.

---

[141] DFDS offers combined 'land-bridge' tickets for travel from the Republic of Ireland via Great Britain and then to Continental Europe: www.dfdsseaways.co.uk/ferry-routes/combined-ferry-tickets, in collaboration with Stena.
[142] Question 14 of the market questionnaire.

7.21 DFDS told us that [✂]. It thought that the pricing on Dover–Dunkirk was constrained by pricing on Dover–Calais but that the reverse was not true. It also explained that the Dover–Dunkirk sailings were up to an hour longer than those between Dover and Calais, which meant that more fuel was used on each journey. The longer sailing time also meant that a ship operating this route could do fewer round trips than a ship deployed on the Dover–Calais route. The combination of these two factors meant that a sailing between Dover and Dunkirk was [✂] per cent more expensive than a sailing from Dover to Calais.

7.22 P&O identified Eurotunnel as its strongest competitor, citing its speed advantage, large capacity, weather reliability, strong brand and costs that were not impacted by raising fuel prices. P&O identified DFDS on Dover–Dunkirk route as a medium to strong competitor, and DFDS on Dover–Calais route as a medium competitor. P&O emphasized that looking at the combined DFDS operations, it reached a scale similar to P&O and therefore the combined operation must be seen as a very strong competitor. P&O stated that currently it viewed MFL as a weak competitor, which had a potential to be strong if it was financially, operationally and commercially supported by GET.

Sales to passengers

7.23 GET told us that the majority of sales for passengers with cars were made directly with Eurotunnel though its website or the in-house contact centre. Prices were set by [✂].

7.24 Coach traffic is almost entirely based on negotiated contracts. Coach and tour operator prices are negotiated and agreed with significant lead times as these prices need to be incorporated into the package price of the coach/tour operator in advance of brochure/website marketing and the commencement of end-user sales.

7.25 Ferries, as well as Eurotunnel, display their public tariffs on their respective websites. Ferry operators also use yield management systems for passenger prices. Prices are adjusted based on the capacity available, target revenue requirements and publicly visible competitor activity.

Nature of freight contracts and competition for freight customers

7.26 Freight represents around [✂] per cent of revenue for ferry operators and [✂] to [✂] per cent for Eurotunnel.

7.27 GET told us that [✂] per cent of Eurotunnel's freight customers, who were the larger customers in volume terms, had individually negotiated rates. As a proportion of total volume (as measured in number of vehicles), negotiated accounts also represent a high proportion of P&O and DFDS.[143] Eurotunnel provides its services to a sizeable number of 'standard rate' customers who account for around [✂] per cent of volume and around [✂] per cent of Eurotunnel's [✂] freight customer accounts have a standard credit account and purchase freight tickets at the standard rate, which is not individually negotiated. These customers have a credit account open with Eurotunnel, pay a standard rate, and do not negotiate their prices directly. The proportion of standard rate customers for ferries is very small (around [✂] per cent by volume).

7.28 Distributors play a relatively more important role for P&O and DFDS than for Eurotunnel—they account for about [✂] per cent of ferry freight volume for both, whereas for Eurotunnel this percentage is around [✂] per cent. Table 9 shows a breakdown of the types of accounts for Eurotunnel and P&O.

[143] DFDS informed us that in 2007 to 2012, on average, [✂] per cent of its freight volumes were sold at negotiated rates, distributors accounted for [✂] per cent and standard rates applied to [✂] per cent.

TABLE 9 **Types of accounts by volume, 2007 to 2012**

per cent

Operator	*2007*	*2008*	*2009*	*2010*	*2011*	*2012 Jan–Oct*
*Eurotunnel**						
Negotiated account	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Standard rate	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Distributor	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
P&O						
Negotiated account	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Standard rate	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Distributor	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: Eurotunnel and P&O, CC calculations.

*For Eurotunnel the type of account was provided as of 2012.

7.29 Expected volumes are taken into account during the annual negotiations but that there are no compulsory volume commitments imposed by Eurotunnel, DFDS or P&O. There is no penalty for not meeting expected volume targets, but if a customer deviates from projected volume significantly, this may be taken into account during the following year's negotiation and may lead to a price increase for this customer. Eurotunnel does not apply volume-based rebates as such, whereas P&O applies rebates based on achieved volumes.

7.30 GET, DFDS and P&O also told us that they considered it to be relatively easy for freight customers to switch operators. DFDS told us that customers' actual decisions to switch would depend on a variety of factors that might be more or less important to them, such as: price, time of travel, frequency, capacity availability and service level. Customers that were particularly time sensitive or required significant frequency were less likely to switch from Eurotunnel's service to use a ferry operator, while the availability of volume discounts might also discourage switching for freight customers.

7.31 P&O suggested that switching could be immediate subject to contract terms—the only delay might be opening an account with an alternative operator, although most customers have accounts with all the different operators. In addition to this, volume

discounts are often passed on in the form of retrospective rebates, so if a customer is forced to switch operator, there would a risk that the rebate would not be achieved.

7.32 GET suggested that since there were no obligations on any freight customers to use Eurotunnel's services, they were free to switch. GET claimed that customers with significant cross-Channel traffic to place would seek to achieve the best price conditions for their expected annual volume, which might be all or only part of the total volume that the customer needed to place. If a customer ended up not reaching this volume, Eurotunnel could revise the price to reflect actual use, at which point the customer could decide whether the cost economics of using the freight shuttle or the ferries had changed and allowing the customer the opportunity to switch traffic around if required to achieve the best solution. GET claimed that in practice, [✂].

CC analysis of the intensity of competition between suppliers on the short sea

Events analysis

7.33 The short sea has experienced a number of significant events in 2007 to 2012 that are helpful in assessing the intensity of competition in the market for freight and passenger services (see Appendix C). We use these events to analyse the competitive interaction between services provided via the Channel Tunnel and those provided by ferries, and to analyse the extent of competitive interaction between the short-sea routes and other neighbouring ferry routes.

7.34 For the freight market, we have examined the following events: *(a)* the exit of SeaFrance in November 2011 and the subsequent entry on to the Dover–Calais route of DFDS in February 2012 and MFL in August 2012; *(b)* a strike by SeaFrance staff in March 2008, and *(c)* the fire in Eurotunnel in September 2008.

7.35 Our analysis shows that immediately following the exit of SeaFrance (December 2011 to January 2012), 33 per cent of SeaFrance's freight volumes diverted to P&O, 37 per cent to Eurotunnel and 30 per cent to DFDS's Dover–Dunkirk route. Approximately two-thirds of traffic substituted to competing ferry operators both on the Dover–Calais and the Dover–Dunkirk routes, while one-third diverted to Eurotunnel. We note that Eurotunnel captured a smaller proportion of SeaFrance volumes than its market share would predict. This may have been affected by short-run capacity considerations, as both P&O and DFDS increased their capacities immediately following SeaFrance exit; while Eurotunnel capacity utilization in December to January was quite high. When DFDS started its Dover–Calais service and P&O expanded capacity in 2012, volume gained on the Dover–Dunkirk route following the exit of SeaFrance transferred almost immediately back to the Dover–Calais route (see Appendix C, paragraphs 87 to 89).

7.36 Examining the effect of SeaFrance staff strike in March 2008, our analysis estimates that SeaFrance lost volume of 35,900 single trips in March 2008, of which 51 per cent of the total was diverted to Eurotunnel, 31 per cent to DFDS's Dover–Dunkirk service, and only 18 per cent to P&O. If we compare these ratios with actual market shares of these operators in the six months preceding the strike (excluding SeaFrance), we note that during this event P&O captured a much smaller proportion of SeaFrance customers than its market share would suggest, and the biggest 'winner' was DFDS, which captured 31 per cent of SeaFrance lost volumes compared with its share of 17 per cent. However, we understand that the strike involved blockades of the port of Calais, which would have negatively affected the level of diversion to P&O and inflated the level of diversion to DFDS's Dover–Dunkirk service.

7.37 Analysis of the diversion following the Channel Tunnel fire in September 2008 is complicated by the fact that this event occurred when the economic crisis was developing. According to our analysis, in September 2008 to February 2009, SeaFrance captured 47 per cent of volumes diverted from Eurotunnel, followed by P&O (38 per cent) and DFDS (14 per cent). We note that Eurotunnel's market share suffered significantly following the fire, falling from 38 per cent in August 2008 to 26 per cent in September 2008, and it was not until December 2010 that Eurotunnel managed to achieve its pre-fire market share. However, as explained in more detail in paragraph 7.42 below, Eurotunnel raised its prices relative to ferries in February 2009, which was likely to exacerbate its position in the market and lead to loss of volumes.

7.38 Our analysis of these events suggests that:

(a) There is no significant evidence of diversion of volumes outside the short sea in response to any of these events.

(b) There is significant diversion between Eurotunnel and the short-sea ferry operators.

(c) There is some evidence that the Dover–Dunkirk route is a relatively close substitute to Dover–Calais crossings.

(d) There is significant diversion between the short-sea ferry operators.

(e) Entry and exit of ferry operators directly affects Eurotunnel's volumes.

7.39 For the passenger market, we analysed the exit of SeaFrance in 2011, entry of DFDS and of MFL on the Dover–Calais route in 2012, and the tunnel fire in 2008. Our general conclusion remains the same as for the freight market (see Appendix C for more details).

Pricing analysis[144]

7.40 In this section, we present the evolution and comparison of freight and passenger prices. Table 10 shows average yearly freight prices expressed in GBP for one single-leg vehicle.[145] These average prices include all account types and all vehicle types.

TABLE 10 **Average freight prices, 2007 to 2012**

£

Operator	*2007*	*2008*	*2009*	*2010*	*2011*	*2012 Jan–Oct*
Eurotunnel	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
P&O	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
DFDS Dover–Dunkirk	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
DFDS Dover–Calais						[✂]
MFL						[✂]

Source: Operators, CC calculations.

7.41 The new entrants on the Dover–Calais route [✂] the DFDS price is [✂], between August and October 2012 MFL has been [✂].

7.42 Figure 4 shows that there is significant premium of Eurotunnel's price when compared with DFDS and P&O prices. In 2009, the premium increased significantly. Irrespective of currency movements, Eurotunnel's price went up relative to ferry operators in 2009, from [✂] per cent in 2008 to [✂] per cent, and then fell again in 2010, and has remained relatively stable since then.

FIGURE 4

Eurotunnel's 'premium' over the prices of DFDS and P&O, %, 2007 to 2012

[✂]

Source: Operators, CC calculations.
Note: DFDS price includes only the Dover–Dunkirk route.

[144] See Appendix D for more detailed analysis.
[145] These are not prices billed in GBP only, but average prices where all revenue is recalculated into GBP using average monthly exchange rates, and then divided by total volume (excluding internal traffic).

7.43 Eurotunnel told us that the price increase in 2009 [✂] at about the time the tunnel returned to normal operation following the fire in 2008. The price increase appears to have contributed to an inability of Eurotunnel to recover the market share lost during the period of restricted operation following the fire. [✂] the relative price of the tunnel slowly returned to levels similar to that before the tunnel fire.

7.44 We examined the ratio of Eurotunnel's price to the average price of P&O on Dover–Calais and DFDS on Dover–Dunkirk, and how this ratio is related to Eurotunnel's market share (see Appendix D, Figure 7). This analysis suggests that while the initial drop in market share that Eurotunnel experienced in September 2008 can be explained by the fire, the extended period of low market share was at least partially precipitated by the price ratio rising significantly following the period affected by the fire.[146] Another factor that may have contributed to the loss of market share by Eurotunnel after the fire was customers' realization that they needed to diversify the modes of transport they use on the short sea and not be so reliant on the tunnel.[147]

7.45 Regarding passenger prices, Eurotunnel's premium over ferry prices has been more stable over time. Table 11 shows average yearly prices in GBP for a car trip. Eurotunnel is [✂] per cent more expensive than P&O, and [✂] per cent more expensive than DFDS.

TABLE 11 **Average yearly prices per crossing (passenger), car, 2007 to 2012**

£

Operator	*2007*	*2008*	*2009*	*2010*	*2011*	*2012 Jan–Oct*
Eurotunnel	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
P&O	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
DFDS Dover–Dunkirk	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
DFDS Dover–Calais						[✂]
MFL						[✂]

Source: Operators, CC calculations.

[146] GET told us that the reason for this increase was that [✂].
[147] This factor has also been mentioned by GET.

7.46 Our analysis of monthly prices for a crossing by a car (see Appendix D, Figure 16) shows that prices follow a highly seasonal pattern, with increases in August, January and around holidays. Historically, the Dover–Dunkirk route has been cheaper for passengers than Dover–Calais. New entrants on Dover–Calais (MFL and DFDS) set their passenger prices on a similar level to those of P&O. Unlike in freight, the ratio of Eurotunnel's prices to the average price of ferry crossings has been fairly stable.

7.47 The general conclusion from the pricing analysis is that Eurotunnel prices its services at a premium, which is notably higher for passengers than freight. Ferry prices on the short sea seem to move quite closely together, including on the Dover–Dunkirk route. [✂] its Dunkirk route [✂] is a higher-cost route to serve (see paragraph 7.21), which shows that the geographic differentiation from operating to Dunkirk (as described by DFDS in paragraph 7.19) is [✂].

Customers' views

7.48 The CC contacted a range of freight customers for their views of competition in the freight market. We sent a web-based questionnaire to all freight customers of Eurotunnel and MFL, as well as to customers on SeaFrance customer lists acquired by GET. Due to the low response rate, we cannot treat the responses as representative of the general population (in a statistical sense) and therefore the results need to be taken as illustrative (qualitative) rather than quantitative evidence. Additionally, large freight customers were sent extended paper-based questionnaires. In particular, due to the lack of statistical significance we cannot use the responses to calculate the actual levels of price sensitivity or route switching that might be expected on the short sea. Our events analysis has been used to assess actual customer behaviour in response to specific market events.

7.49 The main findings based on the freight customers' views are as follows. The freight market is mostly limited to accompanied ro-ro in the short sea, with very limited use of unaccompanied freight, lo-lo and freight trains, and limited ability of freight customers to divert to the Western Channel or North Sea. Many customers multi-source by using several transport operators, with Eurotunnel being the first choice for time-sensitive goods. At the same time, most of the volumes are available to all operators, as only a limited share of freight is restricted to a particular mode of transportation.

7.50 Around half of customers stated that it was very easy or quite easy to switch supplier of transport services. Freight customers' responses showed that there would be likely to be switching between Eurotunnel and ferries (and vice versa) following a 10 per cent price increase in either on the short sea, but the estimates of the diverted volumes varied. P&O seems to be the main choice for switching following a hypothetical price increase by Eurotunnel. Most ex-SeaFrance freight customers stated that they had diverted their volumes to P&O and Eurotunnel, on average in comparable proportions. Some customers would divest a proportion of their volume if there was a price rise both on Eurotunnel and short-sea ferries.

7.51 Many freight customers already use Eurotunnel for one leg of a journey and the ferry for the other leg, and would be interested in a discounted offer of shuttle plus MyFerryLink, but it is difficult to estimate total volumes that would be diverted to such a bundle.

7.52 The general sentiment of large customers was that for non-time-sensitive cargo, ferries and Eurotunnel were quite substitutable and customers did regularly use both and easily switch between them. Eurotunnel was highly preferred for 'just-in-time' freight. Most respondents agreed that 'the frequency of service provided by a ferry

operator is extremely important and changes of frequency would be a consideration in switching to another operator'.

7.53 Similar general points to those expressed by freight customers can be derived from the questionnaire responses of coach and tour operators, except that these customers generally have little interest in a bundle of shuttle and ferry services.

Provisional conclusions

7.54 Over the past five years, there have been transport services across six routes on the short sea. Only three, however, account for over 98 per cent of traffic: Folkestone–Coquelles, Dover–Calais and Dover–Dunkirk. Focusing on these three routes, the Dover–Dunkirk route represents [✂] per cent of total revenue, Dover–Calais [✂] per cent and Folkestone–Coquelles [✂] per cent (see Table 7).

7.55 These three key routes are served by Eurotunnel (Folkestone–Coquelles), P&O (Dover–Calais), DFDS (Dover–Dunkirk and Dover–Calais) and MFL (Dover–Calais).

7.56 The level of ferry capacity on the short sea was significantly reduced towards the end of 2010, reflecting a rationalization of supply through SeaFrance's fleet and staff reduction and the closure of the LD Lines' Dover–Boulogne route. This was broadly reversed by October 2012, following the launch of DFDS and MFL's Dover–Calais services and P&O's purchase of two large ships. The evidence set out in paragraphs 7.10 to 7.15 suggests that there is currently a considerable amount of excess capacity on the short sea.

7.57 Load factors on the ferries were just above [✂] per cent and on Eurotunnel [✂] per cent in 2011. Overall the load factors in 2011 were at their highest in three years and were similar to those seen at the economic peak of 2007. The load factors

experienced by SeaFrance in 2008 and 2009 were well below those of other ferry operators (see Table 8).

7.58 Our analysis shows that there is substantial diversion of volumes between the short-sea ferries and Eurotunnel, and between the short-sea ferries themselves. Entry and exit of ferry operators directly affect Eurotunnel's volumes. There is no significant evidence of diversion of volumes outside the short sea in response to any of the analysed events. (see paragraphs 7.33 to 7.39).

7.59 The pricing analysis shows that although Eurotunnel provides its shuttle services at a premium price, if it raises its price too far or for an extended period it loses market share to the ferries. Evidence from customers supports the view that most of the competition on the freight side of the market is for providers of accompanied ro-ro transport services on the short sea. Customers view short-sea ferries and Eurotunnel as close competitors; it is very common for freight customers to multi-source and agree that switching operators is easy, but strongly prefer Eurotunnel for urgent cargo. Although the price of a large proportion of freight volume is negotiated, this is accounted for by only a small proportion of customers.

7.60 Our events analysis showed that in response to significant disruptions of supply (eg the fire in the tunnel, the exit of SeaFrance), some volume of traffic will divert to the Dover–Dunkirk route. We note, however, that when DFDS started its Dover–Calais service and P&O expanded capacity, volume gained following the exit of SeaFrance transferred almost immediately back to the Dover–Calais route. The Dover–Dunkirk service has an inherent cost disadvantage [✂]: historically, the Dover–Dunkirk route has been [✂]. This, combined with [✂], suggests that if prices increased on the Dover–Calais route, DFDS would not respond by increasing capacity, but [✂]. Additional capacity on the Dover–Dunkirk route would not be added until prices rose

sufficiently across the short sea to cover the full cost of operating more vessels on the Dover–Dunkirk route. This would therefore only occur when prices across the short sea were significantly higher than the cost of operating a ferry service on the Dover–Calais route. For these reasons, we consider that Dover–Calais services exert a stronger constraint on the Dover–Dunkirk service than the other way around.

7.61 Our analysis of the share of traffic and pricing and events analysis together indicate that other ferry routes within the short sea exert no material competitive constraint on either the Dover–Calais services or the Folkestone–Coquelles service.

8. Assessment of the competitive effects of the merger

Introduction

8.1 In Section 5, we provisionally concluded that the appropriate counterfactual against which to assess the effect of the merger was a situation in which DFDS would be operating five ships across the Dover–Calais and Dover–Dunkirk route in competition with Eurotunnel and P&O.

8.2 In Section 6, we defined two relevant economic markets: transport services for passengers on the short sea and transport services for freight customers on the short sea:

(a) transport services to passengers on the short sea (the passenger market); and

(b) transport services to freight customers on the short sea (the freight market).

8.3 In Section 7, we analysed the nature of competition in the relevant markets prior to the transaction.

8.4 We now consider whether the merger has substantially lessened, or may be expected to substantially lessen, competition in these markets by reference to the

counterfactual situation. In doing so, as well as considering constraints operating within the relevant markets, we also take account of competitive constraints that may come from outside the relevant markets.

8.5 The CC's guidance states[148] that it will:

> consider any merger in terms of its effect on rivalry over time in the market or markets affected by it. When levels of rivalry are reduced, firms' competitive incentives are dulled, to the likely detriment of customers. Some mergers will lessen competition but not substantially so because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative.

Views of parties

8.6 GET told us that the merger would not result in an SLC for the following main reasons:

(a) MFL's market shares were currently very small and therefore the market share increase was *de minimis.*

(b) There was differentiation between Eurotunnel and MFL services. MFL was a new operator with a different customer proposition from Eurotunnel in terms of frequency of service, crossing times and price. MFL was a much closer competitor to the other ferry operators than to Eurotunnel.

[148] *CC2*, paragraph 4.1.3.

(c) The transaction had enhanced competition on the short sea. There were now more competitors and capacity on the short sea than would have been the case under the counterfactual.

(d) Rival ferry operators operating on the short sea were strong competitors. In particular, DFDS was a material competitor with a strategy to continue to expand and grow its network. It was progressively growing volume on the short sea.

(e) Ferry operators had considerable spare capacity to be able to accommodate switching demand from customers and, unlike Eurotunnel, had wide route networks. They were therefore able to offer their freight customers route and pricing bundles extending across their other routes, with which Eurotunnel was not able to compete. [✂]

(f) The short sea could accommodate three ferry companies and there were no objective reasons to believe that DFDS would cease operating on the Dover–Calais route.

(g) GET also competed with airlines and Eurostar. In addition, GET faced competitive constraints from operators on routes on the Western Channel and North Sea.

(h) There were low barriers to entry, as shown by the speed with which MFL and DFDS had started operating and the fact that Euroferries is planning to begin operating on the short sea in 2013. Existing operators on the short sea all had the ability quickly to increase their operating capacity.

(i) Ferries were mobile across routes and were readily available. Large network operators, such as P&O and DFDS, could and did move ships across routes.

(j) Customers faced no barriers to switching and readily switched and threatened to switch to avoid price rises. Freight customers generally used several operators to maximize flexibility.

8.7 DFDS told us that it believed that Eurotunnel's aim was to force DFDS off the Dover–Calais route and that, if this was achieved, it would immediately allow the company to increase prices for its rail shuttle business. [✂]

8.8 [✂]

8.9 DFDS believed that there was a natural distinction between those customers who wanted to use the ferry and those who wanted to use the tunnel. This, it believed, made the possibility of tacit collusion between Eurotunnel and P&O more likely. There was a high degree of transparency of pricing in the freight market, as customers would, as a part of the negotiating process, reveal offers received from rivals. It was also possible that prices could be revealed to competitors through the negotiations on prices contained in interoperability agreements.

8.10 In its submission to the OFT, P&O stated that the re-use of the former SeaFrance vessels and related assets on exactly the same Dover–Calais short-sea route, combined with Eurotunnel's already existing pre-eminent position on the short French sea pre-merger, would inevitably enable Eurotunnel to pursue an aggressive pricing policy which would allow it to establish progressively dominant market positions in the markets for freight and passenger vehicles on the short sea. P&O considered that as a result of the creation of such dominance, the transaction would lead to a material loss of competition between Eurotunnel and rival ro-ro ferry operators (P&O Ferries and DFDS/LD Lines).

8.11 We spoke to a number of freight customers. Some expressed concerns about the ability of GET to bundle Eurotunnel and MFL services. In general, however, we received few complaints from freight customers. We note that cross-Channel ser-

vices are likely to represent a small proportion of most freight companies' overall cost base.

Approach taken to the analysis

8.12 We do not consider that an analysis of the effect of the merger based on the current competitive positions of the various operators, as advocated by GET, would be appropriate because the current competitive situation does not appear to be a reliable guide to how rivalry can be expected to be affected by the merger over time: MFL and GET's evidence suggests an expectation of a rapid build-up of market share in the first year of operation, therefore the current competitive position of MFL, less than six months after the operation started, is unlikely to be informative about the level of rivalry in the markets in the medium term. GET told us that its commercial aspiration for MFL was ultimately to develop a share of [✂] per cent of passenger services and [✂] per cent of freight services on the short-sea route within [✂]. MFL told us that its objective was to reach [✂] per cent[149] by the end of 2013 and it expected to be profitable within the next [✂] years.

8.13 In our statement of issues,[150] we identified three ways in which the acquisition could give rise to an SLC (the three theories of harm):

(a) *Horizontal unilateral effects.* Eurotunnel may have an incentive to increase prices following the transaction because it would be likely to lose a smaller proportion of its sales as a result of a price rise. This is because a proportion of the sales that would have been previously lost to its ferry competitors would be likely to divert to MFL and thus the associated profit would be retained within GET.

(b) *The exit of an operator induced by the acquisition*. If only two strong ferry competitors are viable on the short sea and the purchase of the SeaFrance assets by

[149] We note that its current capacity could easily accommodate this.
[150] www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/eurotunnel_issues_statement.pdf.

GET results in the displacement of another operator, this may result in a reduction in the number of major operators from three (GET, DFDS and P&O) to two (GET including MFL, and P&O), thus potentially leading to higher prices.

(c) *The bundling of ferry-based services*. By offering a bundle of Eurotunnel shuttle services and MFL ferry services, GET may be able to disadvantage customers and other ferry operators.

8.14 In practice, these three theories of harm are interlinked: the size of any unilateral effects resulting from the merger will depend, in our view, on how the relevant markets will develop. This includes the market shares MFL is likely to achieve over time and the number of competitors that can be expected to continue to operate in the markets following the merger, and in particular whether the competitive interactions on the Dover–Calais route would result in the exit of an operator from that route. In turn, the ability of GET to bundle Eurotunnel and MFL services may have a role to play in this outcome.

8.15 In our statement of issues, we also stated that we were not proposing to investigate in detail three further ways in which the merger might have had an impact on competition, including vertical effects arising because of a bid that is expected to be made by GET to manage the ports of Calais and Boulogne.[151] The tendering process is at an early stage[152] and its outcome is therefore not sufficiently certain for us to be able to take it into account in assessing the effect of the merger.

8.16 In the rest of this section, we consider how rivalry in the relevant markets can be expected to evolve over time. Given that the Dover–Calais route accounts for the

[151] The other two theories of harm we identified concerned predatory pricing and interavailability agreements. For the reasons set out in our statement of issues, we did not carry out detailed investigations of these theories.

[152] GET told us that according to the tender process, bids must be submitted by 19 March 2013. (This was initially fixed at 15 February 2013, then moved to 5 March 2013,and is now 19 March 2013.) The date is likely to move again, however, as there have been requests for this to be done. The declaration of preferred bidder will be in September 2013, and the date for the intended signature of contract ('Contrat de délégation de service public') is October 2013, with the contract start date being January 2014.

vast majority of freight and passenger volume carried on ferries on the short sea, and given that the recent significant increase in capacity following the expansion of DFDS on to this route and launch of MFL has centred on this route, a large part of our analysis is focused on this route.

8.17 Our analysis, as reflected in the following paragraphs, involved the following steps which together address the theories of harm set out in paragraph 8.12:

(a) We first considered what size operation would be required to be sustain a competitive service and what share of the market was implied by this (minimum efficient scale) (paragraphs 8.18 to 8.25).

(b) We then assessed whether, given the level of demand, capacity and projected growth, it would be possible for both MFL and DFDS to operate on the Dover–Calais route in the short to medium term (paragraphs 8.26 to 8.38).

(c) We then considered which company would be most likely to exit (paragraphs 8.39 to 8.78).

(d) Having made this assessment, we examined the effects of the merger, given this new industry structure (paragraphs 8.79 to 8.103).

(e) We then looked at the likelihood of entry (paragraphs 8.104 to 8.126).

(f) We also considered whether buyer power could counteract the effect of the merger (paragraphs 8.127 to 8.134).

Minimum efficient scale

GET's views (including MFL)

8.18 GET told us that it believed that two ferries were sufficient to operate a service, but that this number still led to some difficulties in relation to frequency of service.

8.19 GET's board considered this issue on 11 April 2012. One board member noted that at least two ships would be necessary to ensure operations. The board discussed the

benefits of having a third ship in the event of a breakdown. A member of the board pointed out the synergies with the tunnel which should serve as a third ship.

8.20 MFL said that it would be possible to operate with two passenger ships, but that for freight customers a third ship would be needed to maintain the level of frequency on the route when one ship was out of service for maintenance reasons and ships would need to be operated 24 hours a day, seven days per week. This would be equivalent to a total of 20 crossings (or 10 returns) per day.

Views of other parties

8.21 We received evidence on the minimum efficient scale needed to operate on the Dover–Calais route from DFDS, P&O and one freight customer:

(a) P&O told us that a passenger and freight ferry company would need to have a fleet of at least two vessels.

(b) DFDS told us that it planned to operate a total of five or six vessels, split between the Dover–Calais and Dover–Dunkirk routes, in order to achieve reasonable economies of scale and to provide the required level of flexibility for customers. The split of vessels between the Calais and Dunkirk routings could be adjusted during the year depending on the requirements of its customers. DFDS considered that the minimum required frequency of service was between eight and ten departures per day to each of the ports. This meant that at least two vessels were needed on the Dover–Calais route and three on the Dover–Dunkirk route.

(c) Customer C told us that cross-Channel ferry operators needed to have three or four vessels, to provide the required flexibility of service on the short sea.

CC analysis

8.22 The evidence we have received suggests that 16 to 20 sailings per day are required in order to deliver the minimum level of frequency that is considered to be acceptable to both passengers and freight customers. On the Dover–Calais route, which is particularly short, this requires at least two ships. The evidence also consistently shows that freight customers value service reliability. An additional ship is needed to cover periods of maintenance or unexpected breakdowns, so access to three ships is required. We therefore consider that the minimum efficient scale of operation requires two fully operational ships and one additional ship for back-up.[153]

8.23 GET's April 2012 analysis[154] showed that a [✂] per cent share of freight and an [✂] per cent share of passengers would enable MFL to cover its operating costs. The same document also suggested that the longer-term objective that would deliver acceptable profitability to the business was [✂] per cent share of freight and [✂] per cent share of passengers.[155] GET told us that these figures had now been revised downwards but did not provide us with supporting evidence. We note that the objectives and expectations of MFL, as described in paragraph 8.12, are consistent with the assumptions made in GET's April 2012 analysis.

8.24 In order to establish what market share is required to break even, we modelled the volume of freight and passengers that would need to be carried on the Dover–Calais route in order to break even, assuming a frequency of 16 to 20 sailings per day overall. Our calculations showed that volumes equivalent to [✂] per cent share of freight and passengers on the short sea would be required assuming 16 sailings and [✂] per cent share assuming 20 sailings. This was consistent with DFDS's own estimate

[153] We note that MFL is operating three ships: two combined passenger/freight vessels and one vessel for freight only.
[154] 11 April 2012 document.
[155] Draft global offer for the acquisition of the operating assets of SeaFrance.

of the additional amount of volume that it would require to transport on the Dover–Calais route in order to break even.[156]

8.25 We therefore consider that a share of at least [✂] per cent of the combined passengers and freight customers on the short sea is necessary for a Dover–Calais service to be viable even in the short term.

Viability of three ferry operators on the Dover–Calais route

GET's views (including MFL)

8.26 GET told us that it believed that there was room to accommodate three well-managed ferry operators on the short sea, as the freight market would be growing at a rate of 2 to 3 per cent. It argued that the reason that SeaFrance had experienced financial difficulties was because it was poorly managed remotely from Paris. It supported its view by reference to an article in which an unnamed source was quoted, saying that 'P&O ferries, SeaFrance and DFDS have substantial businesses. There is room for three big ferry companies, plus Eurotunnel, if competition is based on realistic pricing, rather than suicidal pricing'.[157]

8.27 We noted an interview given by [✂], the CEO of the SCOP and a manager of MFL, on 2 February 2012 in which he emphatically stated that the Dover–Calais route could not support three ferry companies sustainably.[158]

Other parties' views

8.28 DFDS considered that there was too much capacity on Dover–Calais. DFDS also noted that over the 15 years prior to its liquidation, SeaFrance had only made a profit

---

[156] DFDS estimated that an increase of [✂].
[157] Lloyd's List, 24 August 2010.
[158] La Voix du Nord, 2 February 2012: [✂], pressenti pour diriger la coopérative, multiplie les rencontres à Calais jusqu'à ce soir: '…[✂] est catégorique quand on lui demande si la ligne Calais-Douvres peut accueillir durablement trois compagnies maritimes: "Non, clairement non".'

in one year and that it had been subsidized by its parent company, SNCF, and provided evidence submitted by P&O and the French competition authority to the European Commission in support of this statement.

8.29 P&O told us that in the medium term, there would have to be a reduction in the number of ferry operators or the number of ferries being operated on the short sea, as the required level of demand was not present to sustain the current market situation. It thought that, currently, there was around three ferries' worth of capacity in excess of demand.[159] There was sufficient capacity on the short-sea routes following the SeaFrance exit so, with the reintroduction of the vessels acquired by Eurotunnel, there was now excess capacity.

8.30 Customer C considered that the current situation of excess capacity on the short sea, in a market where the only growth was derived from taking volume away from the Western Channel and North Sea routes through a price war, could not last. The rates had been decreasing on the Channel year-on-year for five years and the situation was not thought to be sustainable.

CC analysis

8.31 We note that GET's comments and evidence relates to the short sea, rather than the Dover–Calais route. Although SeaFrance was loss making, as least in the period since 2008, we are not in a position to establish the extent to which this was due to poor management. DFDS's comments in its October 2011 bid for the SeaFrance business[160] is, however, consistent with GET's perception that SeaFrance was not efficiently managed. Our analysis in paragraphs 7.13 to 7.15 suggests that the poor performance of SeaFrance in 2008 and 2009 was at least partly caused by excess

[159] P&O told us that assuming a maximum practical level of capacity of 74.1 per cent, the re-entry of the former SeaFrance with two or three multipurpose vessels resulted in a drop in utilization to 56 per cent. The difference between the two illustrates the current level of overcapacity.
[160] Offre de reprise par plan de cession des actifs de la société SeaFrance.

capacity, which was addressed in 2010 and consequently led to an improvement in its loads. We noted in Section 7 that the level of capacity now operated on the short sea has returned to a level similar to that in 2009, before SeaFrance's restructuring. In this section we focus on the Dover–Calais route.[161]

8.32 We first considered whether the Dover–Calais route had historically supported three operators. We noted that only P&O and SeaFrance had operated Dover–Calais services between 1998[162] and the entry of DFDS/LD and MFL on the route in 2012. Since then, P&O has also replaced two of its vessels with larger ships which could potentially have an impact on the viability of other operators on the route. To understand this issue better, we examined the overall change in the level of capacity that has been operated on the Dover–Calais route since 2007 and extrapolated capacity figures for 2013. The focus of our analysis is on the level of capacity provided by the ferry operators as the level of capacity supplied by Eurotunnel has been largely unchanged over the period. Our analysis also includes DFDS's Dover–Dunkirk service, as the company operates the two routes together, although this does not affect the results as capacity on the Dover–Dunkirk route has been broadly flat. Table 12 shows the amount of ferry capacity operated on the Dover–Calais and Dover–Dunkirk routes in the period from 2007 to 2012 and our projections for 2013.

[161] The two sets of figures are therefore not comparable. In particular, at the short-sea level the amount of capacity increased in 2010 due to developments on the Dover–Boulogne route.
[162] P&O and Stena operated a JV between 1998 and 2002.

TABLE 12 **Ferry capacity of DFDS, P&O, SeaFrance and MFL**

Available lane metres

	2007	*2008*	*2009*	*2010*	*2011*	*2012*	*Estimated 2013*
DFDS DD	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
DFDS CD						[✂]	[✂]
P&O	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
SF	29,329,210	29,195,863	27,991,120	22,162,800	19,392,450		
MFL						[✂]	[✂]
Total	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Total CD only	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
							per cent
Annual freight growth	4	–5	–14	3	5	3	2–3
Annual passenger growth		–5	–1	6	0	–3	0

Source: Ferry operators, CC analysis.

8.33 The analysis in paragraphs 7.10 to 7.15 shows that there has consistently been spare capacity on ferry services on the short sea over the past five years and we understand that in order to deliver an acceptable standard of quality it is necessary to retain some spare capacity. We sought to estimate whether there was excess capacity, over and above this necessary level of spare capacity.

8.34 Since SeaFrance stopped operating in November 2011, we did not consider that 2011 would constitute an appropriate benchmark. We therefore considered that 2010 would be more appropriate, particularly as SeaFrance had ceased operating two vessels (out of six) in 2009 in an attempt to reach a more sustainable cost base. We note, however, that in its bid for the SeaFrance business DFDS assumed that SeaFrance could be sustainable only if the fleet comprised only three ships (the *Berlioz*, *Rodin* and *Nord Pas-de-Calais*) and with the synergies of being operated with DFDS. We also received evidence from P&O that the *Moliere* was significantly underutilized. We therefore consider that our approach results in a conservative estimate of the unsustainable level of spare capacity.

8.35 Table 12 above shows that, against a benchmark of the 2010 capacity, there is now in 2013 excess capacity of [✂] million lane metres which is close to the capacity operated by each of DFDS and MFL on the Dover–Calais route. Since both companies operate at or close to the minimum level of scale,[163] removal of this excess capacity could not be achieved through the independent reduction of capacity by each operator.

8.36 The freight market is anticipated by GET to grow at a rate of 2 to 3 per cent and by DFDS to grow at a rate of 2 per cent, while the passenger market is expected to remain flat. Given the level of excess capacity, it is unlikely that market growth would result in a level of demand sufficient to support both MFL and DFDS in the short to medium term. However, over a period of [✂] years, this level of growth would potentially add volume to the short-sea freight market that would be equivalent to a [✂] per cent share of the freight market in today's terms. It could be argued that this additional volume on the short sea would be sufficient to support a third ferry operator on the Dover–Calais route by [✂]. However, we do not believe that this is a likely outcome. The growth would only be sufficient to support a third operator if this operator were able to capture all the growth. It seems more reasonable to assume that market growth would be distributed across the operators broadly in proportion to their individual shares of the freight market. In addition, no growth is envisaged in the passenger market, and, as noted in paragraph 8.24, a share of [✂] per cent of both markets is needed for a service to be viable.

8.37 We also considered whether P&O would be likely to reduce its level of capacity in the short to medium term as a response to the current level of competition. We consider this to be unlikely, particularly as it has recently increased its capacity through the

[163] DFDS operates on the Dover–Calais route with two vessels (but five across the Dunkirk and Calais route). MFL operates two ferries for passengers and freight and one for freight only.

replacement of older vessels by larger ships, thus making the reduction of capacity more difficult, as customers value frequency. In addition, as the largest ferry operator with a long-established presence on the short sea, we consider that P&O has a strong incentive to maintain its level of capacity in the expectation that one of the smaller operators will exit the route. Our view does not preclude the possibility that P&O might reduce capacity in response to changes in demand conditions or after one of the other two operators has left the route if the route P&O judged this necessary to improve profitability.

8.38 On the basis of the above analysis, we consider that there is excess capacity which could only be removed through the exit of either MFL or DFDS from the Dover–Calais route.

Which operator is more likely to exit the Dover–Calais route?

GET's views

8.39 GET told us that it saw no reason to believe that, simply because it had acquired the vessels and other assets, there was any realistic prospect of DFDS or P&O being excluded from the short-sea market or even the Dover–Calais route. In reaching this view, GET took account of DFDS's public statements about its group strategy of expanding across routes and DFDS's comments and the press commentaries about DFDS's success on the short-sea operation, as well as publicly available information on DFDS's business from its most recent annual report.

8.40 GET also noted that the November 2012 Nordea report reaffirmed DFDS as a 'buy' rating and gave no indication of DFDS being likely to cease operating on the short sea, and in fact the analyst report expressly noted the limited impact of MFL on the short-sea route.

8.41 GET further argued that its financial strength was more limited than that of its competitors, and in particular that DFDS benefited from huge financial backing. It also noted that with a 20 per cent share, it now was the second largest operator on the short sea.

8.42 For these reasons, it concluded that [✂].

DFDS's views

8.43 [✂]

8.44 [✂] It was not considered a viable option to wait until the decisions of the competition authorities had been reached before deciding whether to acquire another vessel, as the offering of a one-ship service on Dover–Calais was not acceptable to most customers.

8.45 [✂]

8.46 [✂]

CC analysis

8.47 In order to reach a view on this issue, we considered evidence relating to:

(a) the size of losses sustained by MFL and DFDS and their expectations/plans;

(b) the financial strength of DFDS and GET;

(c) whether the ability to bundle services could have an impact on the outcome; and

(d) the economic and strategic incentives of GET and DFDS.

Size of losses and companies expectations/plans

8.48 In its projections for the MFL business as set out in its 11 April 2012 [✂],[164] from 2012 [✂] to cover negative cash flow [✂]. A €[✂] million inflow was expected from the SCOP, so the net investment required by GET was expected to be €[✂] million. As at January 2013, MFL expected that it would lose €25 million in next 18 months.[165] MFL forecast EBITDA losses of €[✂] for the period of 20 August to 31 December 2012.

8.49 GET told us that it did not expect MFL to break even before the end of [✂]. MFL confirmed that it would take [✂] years for the business to reach profitability.

8.50 [✂] Its current projections show significant losses [✂] on the Dover–Calais route in 2013.[166] [✂]

8.51 The report prepared by DFDS for its 15 January 2013 board meeting set out a number of expectations for 2013, including that MFL would have a negative impact on profitability, that two vessels would be operated by itself on the Dover–Calais route [✂]. It also expects to achieve [✂] on the short sea. It anticipates an improvement in its share of short-sea freight and passenger volume [✂].

8.52 Considering the performance of DFDS's short-sea business in the context of its entire Shipping Division (which groups all its ferry operations), we noted that in the first three quarters of 2012, the short-sea operations accounted for 17 per cent of the division's revenue. It is the smallest division but it is increasing in importance. In 2010 and 2011, the short-sea operation generated the lowest return on invested capital of any of the division's businesses. In its quarter 2 presentation, DFDS noted that the

---

[164] Draft global offer for the acquisition of the operating assets of SeaFrance.
[165] www.lloydsloadinglist.com/freight-directory/sea/eurotunnel-expects-25m-mfl-loss/20018017346.htm;jsessionid=67DACA025ECAEEBB016248CF53BF8A62.49f4d07bb55175180e5453a50ae76331b9143bfd.
[166] Assumes an exchange rate of €1 = DKK7.46.

Dover–Calais route had performed below expectations and that the launch of MFL would reduce profitability.

Financial strength of DFDS and GET

8.53 We considered which of DFDS or GET would be less able to sustain losses on the Dover–Calais route for a period of time. In reaching our view, we analysed the financial results of both companies.

8.54 With a turnover of about €1.6 billion[167] in 2011, the DFDS Group is nearly twice the size of GET in revenue terms, but its EBITDA margin is significantly lower (13 per cent in 2011). DFDS is nevertheless a profitable company and with a debt to EBITDA ratio of 1.7 times (at 31 December 2011) it has a relatively low level of debt. DFDS reported a decline in earning in Q3 2012 compared with Q3 2011, which it stated was due to lower earnings in its North Sea business, whilst earnings in other areas were maintained through efficiency and improvement projects. It reported that demand was weaker in all areas.

8.55 GET's 2011 turnover was over €850 million and its EBITDA margin was 47 per cent. In the 12 months ended 31 December 2011, its free cash flow was €132 million and in the six months to 30 June 2012, its free cash flow was €45 million. Although GET has a high level of debt and repayments start in 2013, it is expected to have no difficulty meeting its banking covenants in 2013.

Bundling

8.56 We considered whether the ability of GET to bundle Eurotunnel and MFL services or the ability of DFDS to bundle services across routes might give either party a competitive advantage that would be sufficiently large to contribute materially to the exit

[167] Assumes an exchange rate of €1 for KK 7.46.

of the other party. The analysis underpinning our provisional conclusions on this matter is set out in detail in Appendix E.[168]

8.57 The possibility of offering bundled services is mainly relevant in the freight market. In principle, companies may be able to adopt two different types of bundling strategies: in a 'pure' bundling strategy, the goods are only available in a bundle and cannot be purchased separately, whereas in a 'mixed' bundle strategy, the goods can be purchased as a bundle or on a stand-alone basis. The evidence set out in Appendix E, paragraph 5, suggests that a 'pure' bundling strategy is not feasible in this market and therefore we consider a 'mixed' bundling strategy to be more likely. Indeed one of GET's stated rationales for the merger appears to be somewhat akin to a 'mixed' bundling strategy (see paragraphs 3.28 to 3.34). Similarly, if DFDS were able to adopt a 'pure' bundling strategy across its portfolio of routes, it would already have done so. On the other hand, we note that it has actively pursued a 'mixed' bundling strategy in the past.

8.58 We note that a proportion of freight customers value highly the combination of speed and frequency that the tunnel provides: it was estimated by GET that about [✂] per cent of the freight market was accounted for by customers for whom crossing times are critical.[169] These customers may therefore be considered to be 'captive' to Eurotunnel and therefore more likely to be pressured to purchase a bundle. Most third parties we talked to thought it unlikely that GET could force a bundle on customers. [✂]

8.59 Given the mixed evidence that was available to us, we could not establish whether [✂]. We note that GET is, however, currently restricted in its ability to bundle

[168] The appendix explores this issue in the context of the theory of harm that was set out in our statement of issues. We consider that this theory of harm is only relevant to the extent that it would contribute to the exit of one of the operators from the Dover–Calais route.
[169] 26 April Board Minutes: reference to a presentation made by the commercial director.

services across its tunnel and ferry operations for a period of five years by undertakings it has given to the French competition authority.[170]

8.60 We therefore provisionally conclude that the ability of GET to bundle services across its Eurotunnel and MFL operations is unlikely to have a material impact on competition on the short sea in the short to medium term.

Analysis of incentives

8.61 We considered the strength of the incentives of GET and DFDS to continue to operate the Dover–Calais route, based on a number of dimensions that we believed to be material to their decision either to continue to sustain losses or withdraw from the route: this included their ability to recoup losses in the long term; the strategic importance of the Dover–Calais route to their business; the visibility of losses to their shareholders; size of exit costs; and nature of their business model.

8.62 DFDS stated publicly,[171] following the launch of the Dover–Calais route, that it was strategically important in the long run and would be initially loss making. However, the launch of MFL had an impact on the profitability of the Dover–Calais route and in such circumstances it would be normal commercial behaviour to keep route performance under review in terms of ongoing viability. We noted that its annual report gave a degree of prominence to the performance of its short-sea services. DFDS might be considered willing to absorb a prolonged period of losses in competition with MFL, P&O and Eurotunnel if this were eventually to end with the exit of MFL, and a rise in prices. However, with P&O and Eurotunnel still in the markets, any rise in prices would be unlikely to be sufficient to compensate DFDS for the earlier period of losses. We therefore do not think that it would be rational for DFDS

[170] www.autoritedelaconcurrence.fr/pdf/engag/12DCC154engagements_version_publication.pdf.
[171] Q1 2012 presentation.

to hold out for a long time in the hope of an MFL exit.[172] In addition, ferry operators deploy their assets flexibly across routes, responding to opportunities where they see them arise and closing down services in response to local conditions. We noted that DFDS had withdrawn from the Irish Sea in 2011 and that its exit from the Dover–Calais route would not incur material costs, since it had chartered vessels and was using its existing operation centre in Dover.

8.63 As explained in paragraphs 3.50 to 3.53, we consider that the main objective behind GET's decision to acquire the SeaFrance assets was to prevent DFDS from acquiring them and entering into vigorous price competition on the short sea. We noted that the GET board had an expectation that it would be able to increase the Eurotunnel yield by €[✂], equivalent to €[✂] million a year, which we estimated to be equivalent to an NPV of €[✂] million over five years.[173] Given that it expects to make a net investment of €[✂] million in the MFL business over the next [✂] years, it seems to us that it will be able to recoup its losses through improved yield in its Eurotunnel business. In addition, MFL has signed up to a [✂]-year contract with the SCOP,[174] it cannot sell the vessels for a period of [✂] years and its business is closely associated with the short sea and the Calais economy. We therefore consider that its exit costs from the MFL venture, including political costs, could be substantial. Finally, GET's business is focused on the management of a long-term infrastructure asset and could therefore be expected to take a long-term approach to its business decisions.

Would DFDS also exit the Dover–Dunkirk route?

8.64 DFDS told us that [✂].

[172] The level of competition that could be expected in this scenario is discussed in Appendix F.
[173] Assuming a 10 per cent discount rate.
[174] Source: Contrat de sous-affrètement et de commercialisation, clause 19: [✂]. In addition, GET has pre-purchased a number of crossings. In practice, this means that GET is committed to the contract for a period of at least [✂].

8.65 We noted that the route had been started in 2000, that its share of the North Sea has progressively increased to 15 per cent and that it had met a customer need that could otherwise be expected to be met by a competitor if DFDS decided to withdraw from the route.

8.66 However, we have received mixed evidence on the level of profitability of this route. The financial data provided by DFDS suggests that the returns it provides are below the company's target and insufficient in the long run. These numbers are, however, not consistent with those included in DFDS's bid for SeaFrance, which show an EBIT margin of 10 per cent. The projections included in this document show that the profitability of the route is expected to decline significantly in Year 4 (2015) to an EBIT margin of 5 to 6 per cent. The company anticipated that increased fuel prices and the sulphur regulations would negatively impact profitability. DFDS told us that at the time of making the Bid, it was overly optimistic on the future developments on the Dover - Dunkirk route.

Would DFDS exit from the Dunkirk route but remain on the Calais route?

8.67 We considered the scenario in which DFDS would withdraw from the Dover–Dunkirk route but remain on the Calais route. We noted that due to its characteristics, the Dover–Dunkirk route had a higher cost base than the Dover–Calais route, but DFDS [✂], while from a demand perspective the Dover–Dunkirk and Dover–Calais routes are close substitutes, at least for the marginal customers on the Dover–Dunkirk route.

8.68 Against these facts, we noted that GET told us that its research indicated that some [✂] per cent of Eurotunnel's freight traffic passed Dunkirk on the way to Calais. For these customers, using the Dunkirk route would save more than 20 kilometres of driving, although the crossing time from Dunkirk to Calais is then longer and depart-

ures are less frequent. This suggests that the Dunkirk option offers lower road costs (diesel and running cost savings) but increased time-based costs (the cost of driver time in particular). However, a freight customer noted that it was more common for drivers working for Eastern European hauliers to be paid a fixed daily rate. Longer, cheaper crossings could be more appealing in these circumstances. This suggests that a significant number of freight customers may prefer the Dunkirk route as being more cost effective for some of their requirements than using Dover–Calais, which in turn suggests that the Dover–Dunkirk route has some ability to retain a certain volume of short-sea business irrespective of what services are provided on the Dover–Calais route, even if a price differential cannot be supported. In this respect, we noted GET's Commercial Director's comment that 'the rationale for proposing a logical, transparent pricing policy is to … leave low value Eastern volume to DFDS on the Dunkirk–Dover route'.[175] Together, this evidence would suggest that DFDS has an incentive to maintain its operation on Dunkirk as, if it migrated its entire operation to Calais, it would have no assurance of retaining much of the business that it currently carries from Dover to Dunkirk.

8.69 The evidence provided to us by DFDS was that it intended to maintain its Dover–Dunkirk service while expanding on to the Dover–Calais route. We note that when DFDS entered the Dover–Calais route in early 2012, it did not choose to migrate all its operations to Dover–Calais in the period between the exit of SeaFrance and commencement of operations of MFL.

8.70 None of the third parties we spoke to or the analyst reports we reviewed suggested that DFDS was likely to exit the Dover–Dunkirk route in favour of operating solely on Dover–Calais.

[175] Source: 26 Apr 2012 Outline of the commercial positioning for a combined shuttle & ferry offer.

Provisional conclusions

8.71 Both companies anticipated losses on the Dover–Calais route in the next 12 months. We note that GET anticipated that it would continue to fund losses until the end of [✂]. We have seen no evidence to suggest that DFDS would be prepared to sustain losses for as long a period of time.

8.72 Based on our review of the two companies' financial positions, we consider that they both have the financial strength to sustain losses on the Dover–Calais route.

8.73 Although both companies view the Dover–Calais route as strategic, for the reasons given in paragraphs 8.61 to 8.63 above, we consider that GET has significantly stronger incentives than DFDS to continue operating a loss-making service on the route. GET would also incur significantly greater exit costs.

8.74 Our view is that DFDS is more likely than GET to exit the Dover–Calais route. Given the size of the losses being incurred by DFDS on this route, we expect this outcome to be reached in the short to medium term.

8.75 As a result of the expected exit of DFDS, 5 per cent of the passenger market and 4 per cent of the freight market would become available. Even assuming that MFL captured all of this volume, this would not be sufficient to enable it to reach its critical mass. However, the removal of uncertainty linked to the current unsustainable level of competition on the Dover–Calais route would make it a more credible supplier in the eyes of freight customers.

8.76 The evidence we have received [✂], the evidence does not lead us to reach an expectation that it (DFDS) is likely to do so (exit the Dover–Dunkirk route) in the short

to medium term. We reached the view that it was unlikely that DFDS would exit the Dunkirk route while remaining on the Calais one.

8.77 Our analysis leads to the conclusion that the current excess capacity following the entry of MFL would result in the exit of DFDS from the Dover–Calais route. This in turn would result in significant changes to the market structure:

(a) Assuming that MFL meets its immediate market share targets, GET's position in the relevant markets would strengthen significantly. In the freight market, the tunnel currently has a share of approximately 40 per cent by volume which, combined with [✂] per cent forecast for MFL, would lead to a combined share of [✂] per cent. GET's value share would be higher still, likely to exceed [✂] per cent of the freight market. In the passenger market, GET's position would be stronger, with a volume share of approximately [✂] per cent and value share likely to be close to [✂] per cent of the market. Our guidelines note[176] that in markets where products are relatively undifferentiated, shares of less than 40 per cent are unlikely to raise unilateral effects concerns. The likely market shares of the merged company significantly exceed this threshold, and there is a significant degree of product differentiation.

(b) DFDS's competitive position in the relevant markets would be significantly weakened from that of a relatively strong competitor, with shares of around 25 per cent in each relevant market and a sustainable position on the relatively high-frequency and low-cost Dover–Calais route, to a distant third player with a market share of 15 per cent by volume on the high cost Dover–Dunkirk route.

8.78 We note that the analysis in paragraph 8.76*(a)* does not depend specifically on the exit of DFDS but only on MFL attaining a sustainable share of the relevant markets. Any other scenario leading to the same outcome, for example one in which P&O

[176] *CC2*, paragraph 5.3.5.

retrenches, would give rise to the same concerns. Only the point made in paragraph 8.76*(b)* depends specifically on the exit of DFDS from the Dover–Calais route.

8.79 We analyse the potential for the transaction to result in unilateral effects concerns, given this market structure, in the following section.

Unilateral effects

8.80 Having provisionally found that following the merger, DFDS could be expected to withdraw from the Dover–Calais route, but would be likely to continue to operate the Dover–Dunkirk services in the short to medium term, we considered whether the merger could be expected to increase the ability of GET to raise prices unilaterally by comparison with the counterfactual situation.

8.81 As explained in paragraph 3.51, GET's rationale for pursuing the merger included two key elements: preventing DFDS/LD Lines from acquiring the vessels, and the rationalization of capacity on the short sea. The board appeared to estimate that the merger would enable Eurotunnel to improve its yield by €[✂], thus increasing revenues for the company by €[✂] million annually.[177] We estimate that the five-year NPV of this price increase is €[✂] million, assuming a 10 per cent discount rate. In addition, GET has not identified material cost savings resulting from the transaction that might be passed on to customers and thus offset the potential adverse effects of the merger.

8.82 We noted the importance of the Dover–Calais route compared with other routes on the short sea. As shown in Tables 4 and 5, it is by far the most popular ferry route both with passengers and freight customers and accounts for 70 per cent of traffic

[177] Convenience translation of the minutes of 6 January 2012: 'the Board considered the average cost of purchasing these vessels and the potential full-year impact of a yield variation of [✂].' Given the words used in the French minutes, which act as the official set of minutes, we believe that the word 'considered' means 'weighed' in this context.

carried on ferries on the short sea. Although it has grown its share of traffic, the Dover–Dunkirk route suffers from being longer and unable to support a high level of frequency. Other routes are marginal and cannot be expected to pose a significant competitive constraint on Dover–Calais. Against this background, it seemed to us that any weakening of the level of competition on the Dover–Calais route would result in a weakening of competition on the short sea. This is analysed in paragraphs 8.95 to 8.103.

8.83 The evidence set out in paragraphs 7.33 to 7.47 suggests that although it is subject to competitive constraints from ferry operators in the short sea, Eurotunnel has a unique competitive position that is derived from a differentiated product that could not be replicated in the foreseeable future.

8.84 We compared the increase in GET's market shares following the merger to the likely market shares of DFDS under the counterfactual. We noted that the merger would result in a previously strong competitor reaching a share of both relevant markets that would exceed [✂] per cent. By contrast, under the counterfactual, DFDS would improve its position from that of a relatively weak competitor with a 15 per cent share of the markets achieved on a suboptimal route[178] to a stronger competitor better able to pose a competitive constraint on Eurotunnel and P&O. Indeed, P&O commented that in isolation, the Dover–Dunkirk route had moderate frequency, and did not operate to the first choice of French port, but that the combination of the Dover–Dunkirk and Dover–Calais routes would make DFDS a strong competitor. By contrast, P&O perceived Eurotunnel to be a dominant force in the market in its own right.

[178] The costs of the route are significantly higher than that of Dover–Calais: bunker costs are 57 per cent higher on the Dunkirk route; and the utilization of assets is 25 per cent higher on the Dover–Calais route. The higher utilization results from the practical number of trips per 24 hours being ten per ship on Calais–Dover and eight on Dunkirk–Dover.

TABLE 13 **Comparison of change in market shares between the post-merger situation and counterfactual**

per cent

Merger effect	*MFL*	*ET*	*GET combined*
Volume			
Freight	[✂]	40	[✂]
Passenger	[✂]	45	[✂]
Value			
Freight	[✂]	[✂]	[✂]
Passenger	[✂]	[✂]	[✂]
Counterfactual	*DFDS–DC*	*DFDS–DD*	*DFDS combined*
Volume			
Freight	[✂]	15	[✂]
Passenger	[✂]	15	[✂]
Value			
Freight	[✂]	[✂]	[✂]
Passenger	[✂]	[✂]	[✂]

Source: CC analysis of volume and revenue data provided by the operators.

8.85 Against this background, we examined the effect of the merger on the incentives of Eurotunnel and the ferry operators to increase prices. We considered two possible effects:

(a) an 'internalization effect', resulting from the retention of lost profit within GET following a price rise by Eurotunnel; and

(b) a 'competition-weakening' effect due to the changed incentives resulting from a change in the competitive pressures exerted on all ferry operators in the relevant markets.

'Internalization' effect

8.86 This effect is explained in detail in Appendix F. In principle, following a merger, it can be expected that a price rise would become less costly to the merging parties because the proportion of the revenue (and associated profit) that would have been lost prior to the merger as a result of being diverted to the acquired business would be retained within the merged entity following the transaction. The strength of this effect can be estimated and will depend on the amount of revenue that can be expected to be diverted to the acquired business (the diversion ratio) and the profit

margin of the acquired business. (See Appendix F, paragraphs 2 to 4, for more detail.)

8.87 MFL has only been operating for a brief period, and is expected by GET to grow over time. We therefore do not have direct evidence of the likely diversion ratio between Eurotunnel and MFL based on historical analysis of events on the short sea. To deal with this issue, we calculated diversion ratios from Eurotunnel to MFL based on GET's target shares for MFL. We used both the target that it expects to reach in order to break even by the end of 2013 and the target that it anticipates MFL will reach within three years and will then sustain.[179]

TABLE 14 **Shares and diversion ratios**

per cent

	End 2013	*About 2015/16*
Shares		
Freight market	[✂]	[✂]
Passenger market	[✂]	[✂]
Diversion ratios		
Freight market	[✂]	[✂]
Passenger market	[✂]	[✂]

Source: GET's internal documents, CC analysis.

8.88 Based on this analysis, we considered that it is reasonable to estimate that diversion ratios would be in the range of [✂] per cent for both freight and passengers would be a reasonable estimate.[180]

8.89 Using data on the actual margins achieved by other ferry operators and MFL's evidence, we took the view that a short-run margin of [✂] per cent for passengers and [✂] per cent for freight and a long-run margin of [✂] per cent (across passengers and freight) would be appropriate measures for MFL. We consider that the

[179] Draft global offer for the acquisition of the operating assets of SeaFrance, Presentation to the GET SA Board meeting: 11 April 2012, p9. The breakeven targets were confirmed by GET in its evidence to us.
[180] Diversion ratio estimates assume that ferries account for about 60 per cent of the freight market and 55 per cent of the passenger market.

short-run margin is more relevant for our analysis, as explained in Appendix F, paragraph 18, because the level of capacity available to MFL using its three ships would accommodate the share of market that it is aiming to capture, and because in the passenger market in particular, prices and volumes could be optimized in the short run across the tunnel and MFL. For these reasons, we do not consider that marginal gains in traffic on MFL following price increases on the tunnel would require investment in new vessels or additional crossings for the purpose of accommodating that traffic, and therefore long-run margins are not appropriate in this case.

8.90 To understand better whether the effect of the merger could be expected to be substantial, we performed two sets of calculations using a range of assumptions consistent with the data set out in paragraphs 8.87 and 8.88 above: an indicative price rise (IPR) analysis and an upward price pressure analysis (GUPPI). The calculations are set out in Appendix F, paragraphs 19 to 36. The comments we received from GET and its economic advisers on our analysis are considered in detail in Appendix F, paragraphs 45 to 59.

8.91 It is worth repeating the point made earlier that this analysis of upward price pressure does not depend specifically on the assumption of DFDS exit from the Dover–Calais route, but only on the assumption that MFL attains a sustainable share of the relevant markets. It should also be noted that it is the nature of IPR and GUPPI calculations that they answer a question about the incentive of a firm with market power, gaining control of partially substitutable products, to raise prices on the assumption that its rivals' prices are given. This is not a predictive exercise seeking to determine equilibrium prices, but rather an evaluative one which seeks to give a measure of the degree of upward pricing pressure resulting from the increased market share. In practice, any increase in prices would be expected to be higher, once rivals' responses are included.

8.92 The results of the IPR calculations are shown in Table 15. The figures in bold indicate our base case assumptions.

TABLE 15 **IPR calculations**

per cent

	Diversion: [✂]	*Diversion:* [✂]	*Diversion:* [✂]	*Diversion:* [✂]
Freight				
Margin: [✂]%	[✂]	[✂]	[✂]	[✂]
Margin: [✂]%	[✂]	[✂]	[✂]	[✂]
Passengers				
Margin: [✂]%	[✂]	[✂]	[✂]	[✂]
Margin: [✂]%	[✂]	[✂]	[✂]	[✂]

Source: CC analysis.

8.93 The results of GUPPI calculations are shown in Table 16.

TABLE 16 **GUPPI calculations**

per cent

	Diversion: [✂]	*Diversion:* [✂]	*Diversion:* [✂]	*Diversion:* [✂]
Freight				
Margin: [✂]%	[✂]	[✂]	[✂]	[✂]
Margin: [✂]%	[✂]	[✂]	[✂]	[✂]
Passengers				
Margin: [✂]%	[✂]	[✂]	[✂]	[✂]
Margin: [✂]%	[✂]	[✂]	[✂]	[✂]

Source: CC analysis.

8.94 The calculations indicate that the effect of the merger on the incentive to increase prices because of the internalization of proportion of profits lost by Eurotunnel to ferry operators would be sufficiently large to give rise to concerns. This is particularly the case when considered alongside the evidence set out in paragraphs 8.80 to 8.83. GET's main rationale for the merger was to pre-empt aggressive price competition by DFDS and to achieve capacity rationalization. GET weighed the cost of the vessels against a potential improvement in yield of €[✂] and we have seen no evidence that the merger would result in any material efficiency savings that would be likely to be passed on to customers. We consider that together this body of evidence supports our expectation that the merger would lead to a price increase both in the freight and the passenger markets.

8.95 We also found that these findings were consistent with an analysis of yield, revenue and market share of Eurotunnel in the freight market under three scenarios that was carried out by Eurotunnel to assist the GET board's decision on whether to acquire the SeaFrance assets. The model that was presented to the GET board is discussed further in Appendix F, paragraphs 60 to 64, and shows that: [✂].[181]

'Competition-weakening' effects.

8.96 Competition between ferry operators affects the price of ferry crossings on the short sea and in turn constrains the price that Eurotunnel can charge. The vigour of competition between ferry operators therefore has an impact on the level of profit achieved by Eurotunnel. It follows that if GET manages Eurotunnel and MFL in a way that maximizes profits across the two businesses, it could be the case that MFL would compete less vigorously against other ferry operators in order to avoid damaging the profitability of Eurotunnel. This effect is set out in detail in Appendix F, paragraphs 37 to 44.

8.97 The level of differentiation between ferry operators on the short sea is perceived as small by freight customers.[182] For this reason, a ferry operator could not sustain a substantial price premium over its ferry competitors without losing a significant number of freight customers to other ferry operators. As a result, intense competition between ferry operators will affect the overall level of prices for ferry crossings on the short sea. In turn, given the direct link between tunnel and ferry prices, broadly expressed as a €[✂] premium on the average price per freight vehicle, intense price competition between ferry operators to gain market share would translate into lower

[181] These are shown to be less profitable than the lower price strategy, which is consistent with the current premium (about €[✂]) being optimal given the current traffic mix on the short sea and with GET having no ownership in interest in a short-sea ferry operator.

[182] Most customers have contracts with several operators, and/or perceive switching between operators as easy. Our pricing analysis shows that the prices charged by ferries are similar and have generally been following similar trends. Our events analysis also shows significant diversion between ferry operators. As explained in Appendix F, paragraph 40, because ferry operators' offerings are broadly homogeneous, we have calculated IPR and GUPPI estimates for MFL. Our analysis has focused instead on MFL's incentives to compete vigorously.

tunnel prices. Therefore in setting prices (or the level of capacity) for MFL, GET would take account of the potential impact of its decision on the revenue and profitability of its tunnel operation. Given the respective sizes and likely margins of both businesses, all other things equal, GET/MFL would therefore have less incentive than an independent operator to set low ferry prices to fill its current capacity or to increase capacity. We note that MFL's pricing policy at launch involved a €[✂] prices to freight customers. Such a policy would seem irrational for an independent ferry operator in a similar competitive situation,[183] and can be largely explained by GET's incentive to protect Eurotunnel's revenue. This is also consistent with the rationale of the acquisition of the Vessels, which was to avoid aggressive price competition between ferry operators. Although under the counterfactual DFDS would also take into account the impact of its pricing or capacity decisions for its Dover–Calais service on its Dover–Dunkirk route, the incentive to compete less aggressively would be weaker than that of GET due to the relative sizes of the two services for DFDS and the respective growth potential of the two routes—the Dover–Calais route being more important due to its size, cost structure and attractiveness to customers.

8.98 Given its current position in the relevant markets, we do not consider that MFL would be able to maintain prices above the prices of other ferry operators. We consider, however, that the incentive described in paragraph 8.96 above would be likely to translate in the short term into the setting of prices in line with the market leader and in the longer term into a voluntary restraint on increasing capacity (which may result in a lower level of frequency and therefore a worsening of service quality relative to the counterfactual) by MFL to avoid the risk of vigorous price competition to fill spare

[183] We might expect a smaller player with capacity to fill to price aggressively to gain market share in order to reach breakeven point.

capacity. We note that MFL has revised its original pricing policy and now sets its prices [✂]. We also note that [✂].[184]

8.99 We considered the likely response of competitors to subdued competition by MFL. Both P&O and DFDS currently have spare capacity. In the case of DFDS, following its exit from the Dover–Calais route, we consider that it would be limited in its ability to price aggressively to win market share, given the cost structure of the Dover–Dunkirk route. DFDS also recognizes that a price increase on the Dover–Calais route could potentially enable it to raise prices on its Dover–Dunkirk route.

8.100 We consider that as the largest operator of ferry services on the short sea, in principle P&O would be able to respond to MFL's strategy by setting lower prices to fill its spare capacity and gain a larger share of the relevant markets. However, P&O's behaviour is likely to be driven by a long-run profit-maximizing strategy and its perception of MFL's likely response. P&O told us that:

(a) In the medium term, there would have to be a reduction in the number of ferry operators or the number of ferries being operated on the short sea, as the required level of demand was not present to sustain the current market situation. It thought that, currently, there was around three ferries' worth of capacity in excess of demand. There was sufficient capacity on the short-sea routes following the SeaFrance exit so, with the reintroduction of the vessels acquired by Eurotunnel, there was now excess capacity.

(b) [✂]

(c) P&O did not anticipate growth in the wider economy and so did not foresee any growth in the short-sea transport market in the short to medium term.

[184] Indeed the 11 April board minutes record that one of the directors states that two ships are needed to provide the right level of capacity, and that the board discusses the benefits of a third ship being operated in case of breakdowns. One member of the board then goes on to say that the tunnel could be used as this third ship. [✂]

(d) P&O's initial concern about the Eurotunnel acquisition was that Eurotunnel and MFL would set low prices in order to prompt the exit of a competitor. This remained a concern for P&O. In 2010, SeaFrance reduced its prices significantly, causing the market rates to decrease. Prices had not returned to pre-2010 levels. A reduction in competition could cause prices to increase but only to a sustainable level. Excessively high prices could increase the likelihood of additional competitors entering on the short sea.

8.101 Based on these comments, we consider it more likely that P&O would respond to subdued competition by MFL[185] by maintaining or increasing its prices (or maintaining its level of capacity). It appears unlikely that it would respond through vigorous price competition or an increase in capacity.

8.102 We note that Eurotunnel's Commercial Director, in a note to the GET board (that was discussed at the meeting during which GET decided to pursue the acquisition of the SeaFrance assets[186]), took a similar view of the way the market could develop if GET adopted a coordinated pricing strategy across Eurotunnel and MFL. In particular, she proposed:

> A coherent and aligned pricing strategy to drive both volume and yield growth
>
> Ferry prices will be directly aligned to shuttle prices with a consistent €/£ differential related to time and mileage/km savings.
>
> Furthermore Groupe Eurotunnel will explore the possibility of publishing a transparent pricing grid – the benefits would be to address any issues arising from possible market dominance and also to reduce negotiation exposure from the largest customers.

---

[185] Under the counterfactual (and in direct competition with DFDS), these incentives would be different.
[186] 26 April 2012 GET Board meeting. GET told us that the board did not adopt the proposals put forward by the Commercial Director and that they played no part in the business case for the acquisition.

8.103 She concluded that:

> The rationale for proposing a logical, transparent pricing policy is to:
>
> 1. Improve the structure, consistency and visibility of prices in the market
> 2. Allow P&O a corridor in which to position its standard prices between Groupe Eurotunnel's shuttle and ferry price positions
> 3. Leave low value Eastern volume to DFDS on the Dunkerque-Dover route.

8.104 Our above analysis on unilateral effects indicates that the merger may be expected to result in a weakening of competition. We now consider the likelihood that entry and/or expansion might change GET's incentives to increase price.

Likelihood of entry

8.105 We considered whether new entry or expansion would be likely to prevent any lessening of competition resulting from the acquisition.

8.106 In assessing whether entry and/or the threat of entry would offset any potential concerns that might otherwise arise as a result of the acquisition, we consider whether entry is likely, sufficient and timely (or whether it is perceived to be such, in the case of the threat of entry) in response to a small worsening of the incumbent's offer relative to the pre-acquisition prices and levels of service.[187]

8.107 In general, the CC considers that for the threat of entry to act as a sufficient constraint to offset competitive concerns, it must be quick and relatively costless. This may be the case if entry does not involve substantial sunk costs and if entry can happen within a year. A constraint from potential entry may arise even if the CC does

---

[187] See *CC2*, paragraphs 5.8.1–5.8.15.

not expect that entry would actually occur. The important factor is whether the incumbent's behaviour is constrained by its perception of the threat of entry.

8.108 In this section, we first consider the history of entry (including entry by acquisition) on the short-sea crossing. We then summarize the factors that affect the ease with which a ferry operator could start a new service on the short-sea crossing in competition with existing operators or could expand its existing services on the short-sea crossing, and the likelihood that it would do so.[188] These factors are discussed in more detail in Appendix E.

8.109 Our assessment of the ease and likelihood of entry was focused on the Dover–Calais route given that this is the route on which MFL operates, and our preliminary views that other short-sea routes exert a limited competitive constraint on this route (see paragraphs 7.60 and 7.61), and we do not foresee circumstances in which the competitive constraint exerted by these routes would increase in the short to medium term. In any event, most of the barriers to entry we have identified would also apply to other routes on the short sea.

History of entry

8.110 We found that ten companies have operated ferry services on the short sea at various times since 1980 and that in general the short-sea crossing has been characterized by exit and consolidation since the 1990s rather than entry and expansion.

8.111 We found that since 1998 the only entrant on the short sea to have built and maintained a significant market share was Norfolk Line, which started a service from

[188] We have not discussed entry into the short-sea market by way of opening a new tunnel link between England and France as it is not a feasible option given that the construction of such a tunnel would need approval by the UK and French Governments and would take many years and very considerable financial investment.

Dover to Dunkirk in 2000. Norfolk Line was acquired by DFDS in 2010. In 2011, the service accounted for 14 per cent of passenger car volume and 16 per cent of freight volume on the short sea.

8.112 Since 1998, there have been five other instances of new services on the short sea, of which three are still operating (albeit in one case by a different operator from the original entrant):

(a) Transeuropa Ferries started a service from Ramsgate to Ostend in 1998 (to replace a service by an operator which had ceased business), initially for freight and subsequently expanded to include passengers.

(b) Transmanche Ferries started a publicly subsidized service from Newhaven to Dieppe in 2001 (to replace the private operator which had ceased operation on the route). The service was subsequently taken over by LD Lines.

(c) SpeedFerries started a catamaran service for passengers only between Dover and Boulogne in 2004. The service stopped in 2008 when SpeedFerries went into administration.

(d) LD Lines started a service between Dover and Boulogne in 2009 but ceased operating the route in 2010.

(e) DFDS/LD started a service from Dover to Calais in 2012.

8.113 Euroferries Limited told us that it was finalizing its commercial and operational plans to introduce a new service before spring 2013 to carry passengers, cars and luxury coaches between Ramsgate and Boulogne. It added that it had announced a service on this route in 2009 deploying another operator's vessel but it had not been able to start the service. We note that Euroferries does not intend to operate in the freight market and its passenger service will be differentiated from other ferry services on the short sea.

8.114 Although the Dover–Calais route has a high volume of freight and passenger cars, there has been no entry by ferry operators on this route in at least the past ten years, other than by DFDS/LD and MFL in 2012. We consider the reasons for this to be the competition from Eurotunnel, which started services in 1994, and the expansion of capacity by P&O which announced in 2008 that it had ordered two 'super-ferries' which came into service in 2012,[189] and more generally the existing operators' low capacity utilization, declining prices and weak demand conditions. We note that Stena RoRo, which had submitted a bid for the *Rodin*, told us that it did not have any plans to enter the short-sea market.

Considerations regarding entry

8.115 The factors we identified that might affect the ease and likelihood of entry are the scale and credibility of the operator, financial risk and perception about the number of operators that is sustainable, the availability of berthing slots and the cost and availability of suitable vessels. These factors are summarized in this section and discussed in detail in Appendix E.

8.116 In order to provide a competitive offering on the Dover–Calais route, particularly for freight customers, an operator has to provide minimum of eight crossings per day in each direction (as explained in paragraph 8.22), and to do so reliably, because if lorries and drivers are faced with a long wait in port before the next sailing, they will use another operator. A service of this frequency requires at least two vessels, and probably a third that can be used when one of the others is out of service for repair or maintenance.

8.117 The credibility of an operator is also important to freight customers because of the feature of the short-sea freight market that freight companies and ferry operators

[189] See Appendix E.

agree annual contracts around the calendar year end. If freight companies use a ferry operator which withdraws from the route partway through the year, they might fail to benefit from volume discounts or rebates with one of the remaining operators. Therefore freight customers are likely to cautious about using a new entrant until they are convinced that its service is sustainable.

8.118 There is a financial risk associated with entry as a result of the lead time likely to be required to build up the volume of freight and passenger traffic, and the costs involved in operating vessels while traffic builds up. We found that the annual operating cost of a ferry is likely to be in excess of €20 million per year and that a ferry operator needs to achieve a market share of [✂] per cent of the short-sea freight and passenger traffic to break even, which is likely to take some time, particularly because it takes time for a new operator to establish credibility with freight customers.

8.119 It appears unlikely that entry would be attractive, given the relatively low level of capacity utilization currently achieved by the existing operators on the Dover–Calais route and the weak economic outlook. The exit or scaling back by one of the existing operators itself would suggest that entry would not be attractive.

8.120 The high cost and long lead time for commissioning and building a new vessel limits the competition that existing operators could face in the medium term from an entrant with a new vessel.

8.121 The capital cost of acquiring a vessel can be avoided by chartering a vessel. Entry could also be achieved more quickly by acquiring a second-hand vessel, with a chartered vessel or by an entrant redeploying a vessel from another route, but there are few, if any, immediately suitable vessels available, as the berthing arrangements

at the ports of Dover and Calais mean that vessels are likely to require modification (which evidence suggests might cost between €1.5 million and €5 million) for operation on the Dover–Calais route.

8.122 The operator of the port of Calais told us that it would be difficult for the port to accommodate more than the number of vessels that were operating in December 2012. The capacity of the Calais port will be increased by the Calais Port 2015 development scheme, which is intended to enable the port to accommodate the traffic forecast for 2020 to 2025, but the first berths are not expected to enter service until 2017/18. We considered that if berthing slots became available in the meantime as a result of the exit of (or scaling back in operations by) one of the existing operators, the remaining operators might seek to utilize those slots (by increasing the number of vessels on the route or frequency of sailings) to prevent another operator obtaining access to the port.

8.123 Our preliminary conclusions are that it appears that while P&O, DFDS/LD and MFL operate on the Dover–Calais route, it may be difficult for a new entrant to obtain berthing slots, but this may not be an issue following the rationalization of capacity on the route. However, a combination of other factors is likely to deter new entry on the Dover–Calais route. Our preliminary view is that the most important of these factors are the scale and frequency of operation required to offer a competitive service, the likely lead time to build a viable market share, the financial cost associated with operating the required number of vessels while building market share and the perception about the number of operators that is sustainable given the low capacity utilization achieved by existing operators.

8.124 We also considered whether the exit of one of the existing operators on the Dover–Calais route, particularly DFDS/LD, might make entry by another operator more

likely. Although such exit might result in berthing slots at Calais and vessels becoming available, our preliminary view is that exit by DFDS/LD would be likely to deter prospective entrants as it would indicate that three efficient ferry operators could not all sustain viable operations on the Dover–Calais route. In this context, we note that in the ten years prior to 2012 there had been only two operators on the Dover–Calais route: P&O and SeaFrance.

Considerations regarding expansion

8.125 The considerations that might affect the ease and likelihood of expansion by an existing operator are discussed in detail in Appendix E. Our preliminary conclusions are:

(a) Expansion could be achieved by increasing the number of sailings made by each vessel, although the maximum number of sailings is limited by the speed with which ferries could cross the Channel, and the level of capacity utilization currently being achieved would not justify the additional costs.[190]

(b) Expansion could be achieved by adding new vessels, which would be subject to the same constraints as faced by a new entrant in relation to obtaining berthing slots and acquiring suitable vessels.

(c) It might be easier for an existing operator to expand than for a new entrant to enter a route because the existing operator would be known to the relevant port authorities and would already have an established relationship with customers on that route and therefore might need less time to build traffic volumes.

8.126 We consider it unlikely that P&O would expand in response to a price increase by GET (for the reasons set out in paragraph 8.99). We also consider that in response to a price increase by GET, DFDS/LD would be more likely to increase its prices on the Dover–Dunkirk route rather than increase capacity, due to the higher cost of

[190] See Appendix G, paragraph 30.

operating this route. DFDS indeed told that a price rise on the Dover–Calais route could also benefit its Dover–Dunkirk route.

8.127 We considered whether DFDS/LD, once having exited the Dover–Calais route, might re-enter if pricing and/or demand conditions became more favourable. Our preliminary view is that re-entry would be unlikely because it would be difficult in these circumstances for DFDS/LD to establish credibility with freight customers[191] that it was committed to the route. We also note that prior to the exit of SeaFrance, DFDS/LD had been unsuccessful in its attempts to obtain berthing slots at Calais.

Countervailing buyer power

8.128 GET argued that it was not the size of a freight customer that determined whether it enjoyed buyer power. In its opinion, it was much more important to assess what options were available to that customer, and the extent of spare capacity among ferry operators and the absence of costs or barriers to switching by freight customers meant that all freight customers, regardless of size, had buyer power in the sense that they could and did switch supplier in the face of price rises.

8.129 Our guidance states[192] that buyer power can be generated by different factors. An individual customer's negotiating position will be stronger if it can easily switch its demand away from the supplier, or where it can otherwise constrain the behaviour of the supplier. Typically the ability to switch away from a supplier will be stronger if there are several alternative suppliers to which the customer can credibly switch, or the customer has the ability to sponsor new entry or enter the supplier's market itself by vertical integration. Where customers have no choice but to take a supplier's products, they may nonetheless be able to constrain prices by imposing costs on the sup-

[191] Based on the views of freight customers we have received.
[192] *CC2*.

plier. Where a supplier is engaged in bilateral negotiations with each of its customers, the relative bargaining strength of the supplier and each of its customers is determined by their mutual dependency. In such situations, it may be easier for large customers to threaten to sponsor new entry or vertically integrate than it would be for smaller customers who could not commit a sufficiently large volume of purchases to make either viable. Conversely, small buyers may be in a better position to switch suppliers because of the lower volume of their purchases. Where individual negotiations are prevalent, the buyer power possessed by any one customer will not typically protect other customers from any adverse effect that might arise from the merger.

8.130 The passenger market (excluding coach operators) consists of small purchasers, most of whom purchase Eurotunnel or ferry services infrequently. As such, it is not likely that customers in the passenger market have any buyer power. Equally, however, we have not identified any barriers to switching in the passenger market, with market shares being determined by the quality of the service and price being offered by competitors on the short sea.

8.131 In the freight market, we received consistent evidence that freight customers typically multisourced and would switch suppliers in response to relative price or service quality changes. The only limitation on this willingness to switch was due to volume rebates: some customers indicated that they would be reluctant to commit to a new ferry operator until they were confident that the operator was committed and would be on the short sea for the long term. This was because if they diverted volume to a new operator which then exited the market, they would lose the benefit of the lower price that they might otherwise have enjoyed if they had given more business to an established operator. Aside from this caveat, however, the evidence supports the view that freight customers can and do switch suppliers, and most significant freight customers indicated that they considered that they had a good negotiating position.

8.132 As shown by our analysis in paragraphs 8.18 to 8.78, the merger and subsequent exit of DFDS from the Dover–Calais route can be expect to result in a market with only two competitors operating the Dover–Calais route. In this situation, achieving price transparency could, for the reasons noted above, significantly reduce the effectiveness of freight customers' ability and willingness to switch. This analysis is confirmed by the paper described in paragraph 8.102, in which GET contemplated strategies to decrease the negotiating strength of its freight customers following the merger.

8.133 In some markets, customers may be able to exercise buyer power and prevent price increases by sponsoring entry or through vertical integration. This is more likely to be a consideration where a customer's demand is large relative to the minimum efficient scale of a supplier. This is not the case in this market. The largest freight customers do not account for a large share of business: our calculations show that Eurotunnel's ten largest customers account for [✂] per cent of freight volume transported through the tunnel. Beyond these customers, there is a very long tail of small customers. Our analysis suggests that most freight customers are relatively small, with [✂] per cent of freight customers accounting for less than [✂] per cent of Eurotunnel freight volume each. GET told us that [✂] per cent of Eurotunnel's [✂] freight customer accounts purchased freight tickets at the standard rate, which was not individually negotiated.

8.134 We note that the fact that large customers have individually negotiated contracts means the short-sea suppliers will have some ability to price discriminate, offering better terms to larger customers and those with more competitive options available to them. This means that the ability of large customers to negotiate favourable terms will not result in price protection for smaller firms.

8.135 We therefore provisionally conclude that the extent of buyer power in the relevant markets is unlikely to be sufficient to protect the vast majority of customers from the adverse effects we have provisionally found are likely to arise from the merger.

9. Provisional conclusions on the competitive assessment

9.1 Given that the evidence we have received suggests that the current competitive situation in the short sea may not be a reliable indicator of future rivalry in the passenger and freight markets, our analysis has first focused on how the supply of ferry services to the relevant markets may evolve in the short to medium term, and in particular whether one ferry operator could be expected to withdraw from the Dover–Calais route and/or the short sea.

9.2 We provisionally find that because of the current level of excess capacity on the Dover–Calais route, it is likely that one of MFL or DFDS will withdraw from the route in the short to medium term. We consider that GET and its subsidiary have stronger incentives to continue to operate on the route, and therefore we provisionally conclude that DFDS is more likely than MFL to cease operating services between Dover and Calais in the short to medium term. Although we accept that DFDS may also exit the Dover–Dunkirk route in the longer term, we did not reach an expectation that it would do so in the short to medium term.

9.3 We next considered the unilateral effects that might result from the merger following the expected exit of DFDS from the Dover–Calais route. We provisionally find that the merger is likely to result in an increase in prices charged both to passengers and to freight customers by Eurotunnel as a result of the retention within GET of a proportion of the profits that would previously have been lost by Eurotunnel to rival ferry operators following a price rise. We also provisionally find that the merger is likely to result in the weakening of competition between ferry operators.

9.4 Given the past history of entry and expansion on the short sea, barriers to entry and the consequences of DFDS's withdrawal from the Dover–Calais route on the perception of ferry operators and freight customers regarding the likely success of future entry or expansion, we provisionally find that future entry or expansion in the relevant markets by ferry operators other than MFL or P&O is unlikely to occur within the time frame of our assessment.

9.5 We provisionally find that the extent of buyer power in the relevant markets is unlikely to be sufficient to protect the vast majority of customers from the adverse affects we have provisionally found are likely to arise from the merger.

9.6 In reaching our provisional conclusions above, we have addressed the various arguments advanced by GET and set out in paragraph 8.6 above on the competitive effects of the transaction. In particular, our provisional view on the competitive effects, based on the evidence and analysis we have carried out (as set out in Section 8 of this provisional decision), is that:

(a) We did not consider it appropriate to use MFL's current market share for our analysis, as the current situation is not informative with regard to the way rivalry can be expected to be affected by the merger.

(b) The differentiation between Eurotunnel and MFL services is taken into account in the diversion ratios.

(c) The current level of competition on the short sea is unsustainable and we expect that there will be a rationalization of capacity on the Dover–Calais route in the short to medium term.

(d) We accept that the ferry operators competing with MFL on the Dover–Calais route are strong companies. We consider that the companies' incentives and their exit costs are likely to determine which operator decides to leave the route first.

(e) We agree that ferry operators have considerable spare capacity but it is not clear that having a wide route network gives them a material competitive advantage in the context of competition on the Dover–Calais route.

(f) We accept that the short sea can accommodate three ferry companies but the evidence and analysis we have considered show that the Dover–Calais route cannot.

(g) We have seen no evidence of substitution between the short-sea services and airlines and Eurostar in response to actions taken by operators on the short sea, disruptions to supply or price increases. Similarly the evidence we have seen suggests that routes on the Western Channel and North Sea do not exert a material constraint on the short sea.

(h) We have found that a combination of factors is likely to deter entry, namely: the scale and frequency of operation required to offer a competitive service, the likely lead time to build a viable market share, the financial cost associated with operating the required number of vessels while building market share and the perception about the number of operators that is sustainable given the low capacity utilization achieved by existing operators.

(i) It may be possible to source a vessel to operate on the short sea, but it would require modification (at a cost) and there may be a lead time.

(j) We agree with GET that customers readily switch between suppliers, but we consider that the extent of buyer power in the relevant markets is unlikely to be sufficient to protect the vast majority of customers from the adverse effects we have provisionally found are likely to arise from the acquisition.

Provisional finding

9.7 We provisionally conclude that the merger may be expected to result in an 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. This

could be expected to lead to a worsening (relative to the counterfactual situation) of the prices charged by both Eurotunnel and ferry operators in these two markets. It could also lead to a worsening of service quality, for example through reductions in service frequency.