COMPETITION COMMISSION MERGER INQUIRY INTO COMPLETED ACQUISITION BY GROUPE EUROTUNNEL S.A. OF CERTAIN ASSETS OF FORMER SEAFRANCE S.A

INITIAL RESPONSE TO NOTICE OF POSSIBLE REMEDIES

Executive Summary

By way of overview, GET considers that:

- There is no need for undertakings in this case, because no SLC can conceivably arise.
- The CC's concern about DFDS must be read against recent press and January market share figures which show clear progression by DFDS, with a share of freight at 22.4%.
- The CC lacks the statutory power to impose a divestment remedy in respect of the ex-SeaFrance ferries or the MFL business.
- Any divestment remedy would be void, for being contrary to the judgment of the Paris Court, if it would render the acquired ferries "inalienable" as a matter of French law.
- A divestment remedy would also lead to explicit conflict with the merger clearance decision of the French Competition Authority.
- Any remedy must take account of its impact on the SCOP and the massive unemployment risk which it entails.
- A divestment that led to a change in the French flag registration of the acquired ferries could result in a material fiscal liability arising for the liquidator of the ex-SeaFrance business.
- Any divestment remedy will lead imminently and with a high level of confidence to reduced customer choice, reduced capacity and likely higher ferry prices – in order, according to the Provisional Findings, to guard against a scenario which is identified as likely, but whose timing is uncertain, in which DFDS will exit Dover-Calais and prices will rise as a result.
- Consequently, any divestment remedy will be impracticable, disproportionate and will lead to the removal of already-existing customer benefits.
- If any remedy is required in this case, a behavioural remedy is the only approach that would comply with the requirements of the Paris Court judgment and the French Authority's decision.

1. INTRODUCTION

1.1 This Initial Response by Groupe Eurotunnel S.A. ('**GET**') provides GET's preliminary views on the CC's notice of possible remedies under Rule 11 of the Competition Commission Rules of Procedure ('**Remedies Notice**'), which was published by the Competition Commission (the '**CC**') on 19 February 2013.

1.2 In the Remedies Notice, the CC set out the remedies which it considered would be likely to be effective in addressing the SLC which the CC considers to arise as a result of GET's acquisition of certain assets of former SeaFrance S.A ('**SeaFrance**') (the '**Acquisition**'). These remedies consisted of the divestiture either of the MyFerryLink ('**MFL**') business or of the assets employed in the MFL business, including the vessels *Berlioz*, *Rodin* and *Nord Pas-de-Calais* (the '**Vessels**').

1.3 GET reserves the right to make further submissions on possible remedies in light of any third party submissions that may be made following publication of this Initial Response. GET is in the process of responding more fully to the CC's provisional findings ('**PFs**'). The fact that GET has provided this Initial Response on remedies should in no way be taken as implying that GET accepts the PFs. On the contrary, GET strongly disagrees with the PFs and is currently working on a response which will demonstrate why the CC should reach a different conclusion.

1.4 In particular, GET considers that **the PFs mistakenly portray DFDS/LD Lines as a weak and vulnerable competitor on the Short Sea route which is at risk of being driven out of the market by GET. This is not a scenario that GET recognises.** For example, attached at Appendix 3 is a copy of an article from Le Nord Littoral of 1 March 2013 in which there is an interview with Jean-Claude Charlo, Finance Director of Louis Dreyfus Transmanche Ferries. In the interview Mr Charlo clearly states, "*if anyone has to leave the Short Straits, it surely won't be us*". In the same article he affirms clearly that DFDS has strong backing from its parent company; that DFDS feels "*more powerful than before*" with the benefit of an "*extremely solid group*" behind it; and that DFDS has decided to "*set itself up in a durable way with a project which will remain on the route*". The article also discusses the growth in passenger and freight volumes which DFDS has enjoyed to date on the Short Sea routes, and that DFDS's financial situation is improving.

1.5 Similar comments were made in another recent interview with Peter Kramp, the President of Louis Dreyfus Transmanche Ferries, and Mr Charlo. In this second interview, DFDS is reported as excluding any possibility of exiting the Short Straits, regardless of the judgment of the CC (re its merger inquiry into the Acquisition) although the CC's final decision may influence DFDS' strategy.[1]

1.6 The CC also cannot ignore publication of the most recent market share figures for January 2013 which show continued growth by DFDS to a 22.4% freight market share, by a quoted multinational with turnover of €1,568 million[2], far larger than Groupe Eurotunnel.

1.7 **GET considers that if the CC proceeds with the approach proposed in the Remedies Notice, the CC's remedies will lead imminently and with a high level of confidence to reduced customer choice, reduced capacity and likely higher ferry prices – in order, according to the PFs, to guard against a scenario which is identified as likely (on the basis of a series of highly contestable assumptions, and whose timing is uncertain in any event) in which DFDS will exit Dover-Calais and prices will rise as a result. The SLC risks identified by the CC are hypothetical, uncertain and may be distant, compared to the imminent detriment to customers' interests that would result from the PFs and a divestment remedy.**

[1] See copy article from Le Journal de la Marine Marchande dated 22 February 2013, at Appendix 3
[2] For the financial year ended 31 December 2012

2. BACKGROUND

2.1 In the PFs, the CC 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*" (Summary, paragraph 13).

2.2 GET fundamentally disagrees and considers that **the PFs**, in particular:

2.2.1 **Represent a cascade of assumptions for which the CC has presented an inadequate evidential basis** and which cannot be considered sufficiently likely to materialise to satisfy the balance of probabilities threshold necessary for the CC to conclude the existence of an SLC.

2.2.2 **do not take proper account of the extent to which DFDS has already achieved material commercial success** on, and has the commercial incentives and capability to remain operating on, the Short Sea and especially on the Dover-Calais route, **and is confident of doing so even if MFL remains present in the market**. DFDS' January market share of 22.4% and its press statements contradict any notion of DFDS being weakened in this market. When DFDS were asked at a recent investor conference announcing their annual results, what impact MFL had on their forecast, DFDS replied, "*we have in our guidance assumed a moderate improvement to 2013 vs 2012 even assuming continued competition from MyFerryLink.*" An analyst queried, "*so a small improvement from the level you did in 2012?*", to which DFDS replied, "*Correct. Small to moderate*."[3]

2.2.3 **are based on fundamentally flawed economic analysis**.

2.2.4 **draw conclusions in relation to passenger services, although the relevant analysis in the PFs relates just to freight services**.

2.2.5 **ignore customers' views** on the transaction, which have been clearly expressed in the CC's customer survey results and in the hearings that the CC has conducted with freight customers.

2.2.6 **place disproportionate reliance on the unsubstantiated comments received by the CC from a very small number of competitors, especially DFDS**, even though those views will be motivated by commercial self-interest. This conclusion is supported by DFDS' Annual Report and Accounts for the financial year ended 31 December 2012[4] (see Appendix 5). The Short Sea market share statistics for January 2013 (see Appendix 6) also indicate that DFDS' shares of freight and passenger services on the Dover-Calais route continue to grow, with DFDS now having the largest share of passenger services on the Short Sea.

2.2.7 **would lead to customers' direct and material detriment** by requiring the removal of capacity now from the Short Sea, reducing the intensity of competition with imminent effect – to safeguard against a risk of an SLC which will arise, if at all, only on some uncertain date in the future in the event that a series of contingencies materialise, and which the CC is concerned might give rise to a possible future rise in prices or other reduction in the intensity of competition. By contrast, the reality of the Short Sea market, characterised by considerable over-capacity, means that there

[3] http://www.dfdsgroup.com/investors/reports/ follow the Annual Reports 2012, Conference Call Recordings, Engligh, link – the statement is made at about 25 minutes

[4] Published on 28 February, 2013

currently is no scope for operators to increase prices, and that this situation will not change in the medium or long term.

2.3 GET strongly disagrees with the PFs and is currently working on a response developing these points.

3. PROHIBITION OF THE PROPOSED TRANSACTION WOULD BE UNLAWFUL[5]

3.1 The CC's statutory powers to impose enforcement orders only apply to a person's conduct outside the UK if they are a UK national, a body incorporated under the law of the UK, or a person carrying on business in the UK[6]. GET submits that **none of these conditions is met in relation to itself or any other entity which might be ordered to divest the MFL business or the Vessels** because[7]:

3.1.1 GET, a French registered company, is a group holding company which does not itself conduct any commercial activities (and certainly none within the UK).

3.1.2 the Vessels are owned by three French registered companies, the direct and indirect holding companies[8] of which are all French registered companies which do not carry on business in the UK.

3.1.3 MFL SAS (the corporate entity through which MFL conducts business) is a French registered company, the direct and indirect holding companies[9] of which are all French registered companies. The contract with the SCOP for the management and operation of the Vessels was entered into by MFL SAS.

3.2 MFL Ltd., an English-registered company, is a wholly-owned subsidiary of ETM Holding SAS, a French-registered company. MFL Ltd. is an unused shell company which has neither staff nor activities.

3.3 The SCOP is a French legal entity in which GET has no shareholding or ownership interest. The SCOP's only subsidiary which carries on business in the UK is Dover Calais Ferries Limited ('**DCF**'), which currently employs about 60 individuals at Dover. Pursuant to a contract with MFL SAS, DCF provides sales and marketing services in relation to UK passengers.

3.4 GET does not propose voluntarily offering an undertaking to divest itself of the business undertaken by MFL SAS or of the Vessels for the following reasons.

3.4.1 Firstly, GET considers that **the Acquisition does not give rise to an SLC in the UK that requires remedying**. In this context, GET urges the CC to reconsider the evidence and to reach a final decision that there is no SLC.

3.4.2 Secondly, even if there were an SLC in the UK (and GET believes that no finding of an SLC is supported by the economic evidence or third party responses on which the PFs purport to rely), it would be **disproportionate to impose a remedy which would have extraterritorial effect outside the UK** and would require GET to unwind an acquisition which has already taken place pursuant to a judgment of the Paris Court **and which acquisition has already been reviewed and approved by the French Competition Authority** ('**FCA**'). Indeed, the conflict with the Paris Court provides a good illustration of why Parliament limited the CC's power to impose remedies concerning conduct outside the UK.

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[5] GET notes that the remit of section 86 of the Enterprise Act 2002 ("**the Act**") is currently a live issue before the Competition Appeal Tribunal in the case of Akzo Nobel N.V. v Competition Commission, Case 1204/4/8/13. The Tribunal's hearing on the *Akzo* appeal is currently due to take place over two days, starting 18 April 2013. If the appellant's arguments on the remit of section 86 are upheld by the Tribunal that will, of course, be directly relevant to this matter.

[6] Enterprise Act 2002, Section 86

[7] The CC is referred to the organigrams submitted in response to the CC's first day letter dated 30 October 2012

[8] **[confidential]**% of the shares in ETM3 SAS (the immediate holding company of the three companies owning the Vessels) are owned by ETM Holding SAS, the entire shareholding of which is owned by GET. A **[confidential]**% **[confidential]** shareholding in ETM3 SAS is held by Europorte SAS, another French registered company.

[9] **[confidential]** shares in MFL SAS are owned by ETM Holding SAS, **[confidential]** of which is owned by GET.

4. DECISIONS OF FCA AND PARIS COURT

Conflict between the PFs and the judgment of the Paris Court re liquidation of SeaFrance

4.1 The Acquisition took effect following a judgment of the Paris Commercial Court on 21 June 2012. In its judgment, the Paris Court gave the following order that the Vessels be sold to GET:

"*order that the ships, given the low price offered and the financial consequences of a possible change of flag and to avoid any speculative transaction to the detriment of the creditors, shall be declared inalienable for a period of five years, within the meaning of Article L.642-10 of the French Commercial Code*".

4.2 The Court also gave an "*order with regard to the buyer's labour-related commitments and in the absence of a performance bond that Group Eurotunnel shall provide a report regarding the labour situation, the level of hiring and operating conditions every six months for a period of two years from the date of the present Order to the Court Receiver and Liquidator's representative*".

4.3 In other words, following the Paris Court's judgment approving GET as the purchaser of the Vessels, **GET is expressly prohibited for a period of five years from selling the Vessels or taking any steps that might render them "inalienable" as a matter of French law**. Any disposition of the Vessels in this period that is contrary to the principle of "inalienability" will be void as a matter of French law.

4.4 The "inalienability" principle has a broad scope as a matter of French law. Any **transaction in breach of the Court Order would be void**, and a legal challenge could be brought by any interested person, potentially including the French Government, the liquidator or the SCOP's employees.

4.5 The Paris Court also had concerns about a change in the French flag registration of the Vessels, because that could trigger a fiscal charge to the liquidator of SeaFrance[10].

4.6 In practice, GET understands that the above aspects of the Paris Court judgment have the following effects, unless the Court gives an express derogation to the contrary:

4.6.1 the **French flag registration of the Vessels may not be changed;**

4.6.2 **GET is clearly prevented from selling the Vessels during the five year period**; and

4.6.3 **GET is prevented from in any way divesting itself of its ownership rights in the Vessels, including by a sub-charter of the Vessels to a third party, during the five year period.**

4.7 The Paris Court was applying French insolvency law and not UK competition law; for its part, the CC is applying UK competition law and not French insolvency law. However, it is important to appreciate their respective jurisdictional limits: the Paris Court had jurisdiction over the Vessels that were registered, owned and operated in France and over the French employees whereas the CC, by virtue of section 86, has jurisdiction over the conduct of business in the UK but no power to override the orders of the Paris Court that concern persons that are not carrying on business in the UK. Moreover, the Paris Court has explicitly ordered GET not to divest itself of the Vessels for a duration of not less than 5 years. There is therefore a clear incompatibility in that **GET cannot respect a decision of the CC to sell the Vessels, or take the other actions identified above, without violating the Paris Court's judgment**.

[10] The Paris Court judgment referred to a possible fiscal charge to the liquidator of €35 million if there was a change in the French flag registration of the Vessels.

4.8 GET notes that EU Council Regulation 1346/2000[11] ('**Regulation 1346**') applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Article 25 of Regulation 1346 states that **judgments handed down by a court which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall be recognised with no further formalities**. Such judgments shall be enforced in accordance with the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

4.9 Article 26 of Regulation 1346 allows any Member State to refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings "*where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual*." However, **in its judgment of 11 May 2000 in *Maxicar/Renault* the European Court held that a judge's doubts about the compatibility of a decision in another Member State on the free movement of goods and competition were not sufficient to allow the judge to refuse to recognise that decision on the grounds of public policy**. Applying that principle and Regulation 1346 to this case, the CC would be bound by the Paris Court's judgment insofar as it related to the Vessels.

4.10 The only way to resolve such an inconsistency would be to seek to lift the sale interdiction ordered by the Paris Court. Article L. 641-10 of the French Commercial code states that such a request may be put to the Court, but it may decline, authorise upon the satisfaction of certain conditions, or authorise such a request unconditionally. Nothing, as a matter of French law, requires the Paris Court to take into account the PFs or even the final decision of the CC when coming to such a view. The Paris Court may well be more likely to take into account the decision of the FCA to clear the merger.

4.11 **If a request for GET to be required to divest itself of the Vessels was made to the Paris Court, the French Government would have to be consulted** by the Court. At the very least, a long period of uncertainty is likely. Any such order sought by the CC would risk having severe employment consequences for the employees of MFL and/or the SCOP. As a result, the French Government would most probably advise the Paris Court against lifting the ban on GET selling the Vessels, or at least request guarantees that may well be contrary to any order sought by the CC for GET to sell or otherwise divest itself of the Vessels, or for any change in ownership that may adversely affect the French flag status of the Vessels.

4.12 It stems from the above that if the CC attempts to require GET to take any of the actions identified in paragraph 4.6 above, this would bring the CC into direct conflict with the Paris Court judgment on an issue concerning French assets and employees that plainly falls within the proper jurisdictional limits of the Paris Court. Such a conflict could only be resolved if the Paris Court unconditionally agrees to endorse the CC's request and forego the requirements it imposed on GET in the Court's judgment, which approach would likely not be endorsed by the French Government.

Inconsistency of the PFs with the merger clearance decision of the FCA

4.13 Following the Paris Court's judgment, the Acquisition was reviewed by the FCA under French national merger control laws, and was approved subject to GET offering two undertakings:

[11] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

4.13.1 first, an undertaking intended to address the issue of bundling of freight services across Eurotunnel and MFL, which the FCA had identified during its first phase merger inquiry as a possible concern; and

4.13.2 secondly, an undertaking relating to the operation of the ports at Boulogne and Calais, should GET win a current public tender exercise to be appointed as manager of those ports.

4.14 In the PFs the CC does not explain either why the decision of the FCA (to approve the Acquisition subject to undertakings) was incorrect or why the undertakings given by GET to the FCA do not alleviate such SLC concerns as the CC has identified in this case. In the Remedies Notice, and in identifying divestment as its preferred outcome, the CC is therefore deliberately adopting an approach that is in clear conflict with the approach taken by the FCA.

4.15 The EU Merger Regulation[12] states clearly that inconsistency of decisions reached by various national merger control authorities is an issue that needs to be tackled in order to avoid the related legal uncertainty.

4.16 The Best Practice guidelines on Cooperation between EU National Competition Authorities in Merger Review have been adopted precisely for that purpose. They apply to multi-jurisdictional mergers that cannot benefit from a referral to the Commission, which is precisely the case at hand. Merger control authorities are strongly invited to "exchange views" in order to "*reach informed and consistent and at least non-conflicting outcomes*" (for more information, see Appendix 2).

4.17 A case for cooperation between the Office of Fair Trading ('**OFT**'), the CC and the FCA was all the more necessary here since, as the Acquisition involved transport markets between France and the UK, the markets being studied are exactly the same (both from a product and a geographic perspective), with the same actors, the same characteristics, etc.

4.18 In other words, this type of case is the very reason why the Best Practice guidelines were adopted and an absence of significant cooperation between national merger control authorities on this case would be directly contrary not only to the Best Practice guidelines but also to the EU Merger Regulation. For its part, GET had expressly requested that the FCA and OFT cooperated closely on their respective investigations; it provided the OFT with English translations of documents submitted to the FCA; and it granted a waiver allowing both authorities to exchange data relating to their respective merger investigations.

4.19 GET has identified in Appendix 1 the most important areas in respect of which there are material inconsistencies between the approach outlined in the PFs and the findings of the FCA. GET considers that such inconsistencies in approach and findings, in relation to the same product and geographic markets, are incompatible with the EU Best Practice guidelines. For the CC to impose divestment remedies, or even behavioural remedies going materially beyond those given to the FCA by GET, would in GET's opinion similarly be incompatible with the EU Best Practice guidelines.

[12] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

5. EFFECT OF DIVESTMENT ON SCOP

5.1 The CC notes, at paragraph 13 of the Remedies Notice that, in assessing the costs of the proposed remedies options, it will "*have regard to the implications of any remedy on the SCOP, which employs a number of former SeaFrance employees*."

5.2 The SCOP is a distinct legal entity from GET, in which the latter has no shareholding or ownership. The SCOP has entered into contractual arrangements with MFL SAS, under which, inter alia, the SCOP operates the Vessels and provides the crew, and MFL has contracted to purchase a minimum number of crossings from the SCOP over a defined period of time[13].

5.3 The SCOP will make its own representations to the CC on the impact of any divestment or other remedies. Ignoring the points made above about the inconsistency of such a requirement with the Paris Court and FCA, GET considers that a CC **requirement to divest the MFL business or the Vessels to an unrelated person would likely have a material adverse effect on the SCOP**.

5.4 The CC considers that there is already very considerable excess capacity on the Short Sea[14], that further new entry is not feasible,[15] and that P&O and DFDS have no reason to expand capacity[16]. In this context:

5.4.1 the only way in which the Vessels would remain in operation on the Short Sea would be if an existing operator, most likely DFDS, purchased one or more of the Vessels to replace a ferry that it was already using in its ferry network. This reduction in capacity is the essential premise of the CC's analysis. In this scenario, there would inevitably be a material reduction in employment, because either the employees used on the ferry operator's current vessel or the SCOP employees manning the Vessel acquired by that operator would cease to be employed.

5.4.2 in all other circumstances, the CC's divestment remedy would lead to the Vessels' ceasing to be used on the Short sea, which would likely have material adverse effects on the SCOP and its employees.

5.5 **Any loss of jobs from amongst the SCOP's employees would have material adverse effects in the Nord Pas de Calais region of France**, which already experiences amongst the highest unemployment rates in France. The benefit of creating employment within this economically depressed region of France was of course a significant aspect of the Paris Court's decision to sell the Vessels to GET. Any divestment order from the CC would overturn the Paris Court's clear will in that respect and would also directly lead to the unemployment of numerous individuals, possibly of all of the SCOP's around 400 employees.

[13] PFs paragraph 3.19
[14] PFs paragraph 8.38
[15] PFs paragraph 8.118
[16] PFs paragraph 8.125

6. DIVESTMENT POSES SIGNIFICANT RISKS THAT COULD BE OVERCOME BY BEHAVIOURAL REMEDIES

6.1 Section 35(4) of the Act states that, in deciding what remedies should be imposed to remedy an SLC, considerations of what is reasonable and practicable should be taken into account. In addition, as stated at paragraph 4 of the Remedies Notice, when deciding on an appropriate remedy it "*will have regard to the principle of proportionality*", and that it "*will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects*".

6.2 As mentioned in section 2 above, a divestment remedy by the CC would lead to customers' direct and material detriment by requiring the removal of capacity imminently from the Short Sea, reducing the intensity of competition with imminent effect. The CC would be taking this step in the view that it is necessary to safeguard against a risk of an SLC which the CC considers likely to arise at an uncertain point in the future and which the CC is concerned is likely to give rise to a possible future rise in prices or other reduction in the intensity of competition. In reality, it is at best highly uncertain whether that SLC will materialise.

6.3 In imposing a divestment remedy in such circumstances, the **CC's proposed remedy involves a substantial "mis-prediction risk"**.

6.4 Merger control is of course forward-looking and necessarily uncertain. The CC has provisionally found an SLC on the balance of probabilities and crucial elements of that provisional conclusion are the forecasts that DFDS is likely to exit and that P&O would not reduce its capacity on the Short Sea. Assuming, purely for the sake of argument, that the CC is quite confident of its SLC finding (say 60% certain, well above the balance of probabilities threshold and quite bold for a level of confidence that depends on complex forecasts about the strategic behaviour of DFDS and P&O). This still allows a 40% risk that there is no SLC (for example because DFDS would not exit). In fact, since the PFs were published, GET has brought to the CC's attention new information showing that P&O has in fact reduced its ferry capacity and statements from DFDS that it will not exit the Dover-Calais route.

6.5 The effect of the remedy however, will very likely be to reduce the number of ferry operators on the Short Sea to two (if DFDS buys or a third party buys and operates the Vessels in another market). If the CC has made a mis-prediction of an SLC (40% chance) the effect will be to deprive customers of competition from three suppliers of ferry services. The remedy will also have reduced, with imminent effect, capacity on the Short Sea, removing an important existing competitive constraint (i.e. MFL) on Short Sea ferry prices.

6.6 This factor is a major concern about a divestment remedy and tips the balance towards the CC accepting a comprehensive set of behavioural remedies, if any remedies are needed in this case (which GET disputes).

6.7 There is no reason to treat this "mis-prediction" risk any differently from the other risks that the CC identifies and discusses at length in its Guidelines. It would be unreal to disregard it.

6.8 Beyond their sheer number, it is the cumulative nature of the hypotheses assumed by the CC that is striking; they all need to be satisfied simultaneously for the conclusion of the PFs to be achieved and the probability that they are *all* achieved is a remote one. Even if it is assumed that all these hypotheses have a 90% chance of being correct, the probability of them being all achieved simultaneously is below 40% (i.e. below the balance of probabilities threshold) which suggests that the PFs' conclusions are more likely than not to be erroneous.

6.9 There is **also a "timing risk**". If DFDS were to stay on the Dover-Calais route for some time after a final CC decision approving the Acquisition (whether for its own

reasons, because P&O has reduced its capacity or otherwise), the customers would benefit from enhanced ferry competition for that period. Even if (despite GET's views) the CC is correct in thinking that DFDS would exit the Dover-Calais route (while remaining on the Dover-Dunkirk route) following a CC approval of the Acquisition, it is difficult to predict when that would happen, and the CC does not attempt to do so specifically. But again this is an unusual factor that points against a divestment remedy because a cost of the divestment will be the loss of competition (arising from the loss of a competitor, i.e. MFL after its forced exit) for the period between divestment and whatever date, if ever, DFDS would have exited.

7. PROHIBITION OF THE PROPOSED TRANSACTION WOULD BE DISPROPORTIONATE

Impact on SLC and resulting adverse effects

7.1 A divestment remedy will not restore a process of rivalry compared to the CC's counterfactual(s), which are flawed for the following reasons (and further reasoning is outlined in Appendix 1).

7.1.1 Under the CC's first counterfactual, it is just as likely that the Nord Pas de Calais and the Rodin would have been removed from use on the Short Sea market altogether (for example, because Stena bid more for the Rodin, with no plans to operate or charter it on the Short Sea routes, and because no purchaser would have used the Nord Pas de Calais on the Short Sea) had GET not made its bid to purchase all three Vessels.

7.1.2 The outcome of the CC's second counterfactual is entirely hypothetical, and it is impossible to predict who would have purchased the Vessels or where they would have been used.

7.1.3 In relation to the CC's third counterfactual, the Paris Court clearly stated that it would not allow the revised bid from DFDS to stand, so it is inconceivable that through its revised bid DFDS would have purchased all three Vessels.

7.1.4 As has been previously submitted to the CC, the FCA expressly rejected as a "mere hypothesis" in its decision[17] "*the situation that would have resulted from the commercial court of Paris making a different decision (liquidation of the assets, sale to another operator)*". The FCA held there were only two possible counterfactual scenarios; either the market as it existed in 2011 before SeaFrance exited the market, or the situation that existed between December 2011 and August 2012.

7.1.5 GET has previously submitted to the CC that the market situation before GET exited cannot be the relevant counterfactual because SeaFrance went into liquidation and permanently ceased trading (which has been accepted by the CC[18]).

7.1.6 GET has also previously submitted to the CC that it considers the requirements of the exiting firm scenario to be clearly satisfied in this case[19], but this has been simply ignored by the CC in the PFs.

7.2 Given the above, GET considers that there is **no need for divestment of the Vessels in order to restore a process of rivalry compared to the relevant counterfactual**. Even under the CC's analysis as set out in the PFs there would be no reduction in the number of operators on the Short Sea in the medium term (even if DFDS were to exit the Dover-Calais route, which GET does not accept as likely) because DFDS would continue to offer services on the Dover-Dunkirk and Newhaven-Dieppe routes, which the CC agrees are in the Short Sea market[20]. In addition, Euroferries has indicated an intention to begin operations in 2013, providing passenger services from Ramsgate to Boulogne. Conversely, a divestment remedy would inevitably lead to the imminent exit of MFL from the Short Sea, reducing the number of ferry operators from three to two on the Dover-Calais route.

[17] FCA decision paragraph 41
[18] PFs paragraph 5.8(a)
[19] Initial Submission paragraph 6.10
[20] PFs footnote 23 and paragraph 6.37

The remedies proposed are not reasonable, practicable or proportionate

7.3 A divestment remedy in relation to the Vessels or the MFL business is impracticable for the following reasons.

7.3.1 For the reasons mentioned in section 3 above, section 86 of the Act does not confer on the CC the statutory power to require GET to sell the Vessels or to sell the MFL business (which is conducted by MFL SAS).

7.3.2 In addition, the 11 June 2012 judgment of the Paris Court prevents GET from selling the Vessels for a period of five years. For the reasons discussed in section 4 above, the breadth of the principle of "inalienability" as a matter of French law means that any requirement of the CC that GET divest itself of the Vessels or the MFL business would need to be approved by the Paris Court, failing which it would be void as a matter of French law.

7.3.3 The Paris Court's judgment also means that even if the Vessels could be divested to an independent person they would need to assume responsibility for the SCOP's employees.

7.3.4 In addition, the Vessels could not be divested to any person who would not maintain the French flag on them, because of the fiscal charge that would otherwise materialise for the liquidator.

7.4 A combination of the above factors means that is **not realistic to assume that the Vessels could be divested without the Paris Court's consent**. Even if the Court did give consent, it is not possible to see how the Vessels could be used other than on the Dover-Calais route. In practice, however, it is very difficult to see how the Vessels could be used even on the Dover-Calais route, including for the following reasons.

7.4.1 The CC has found that DFDS would not want to increase the size of its existing ferry fleet on the Short Sea[21]. DFDS would therefore be unlikely to require more than one of the Vessels to replace the Moliere (its current charter of which is due to expire soon).

7.4.2 The CC has found that there is already considerable spare capacity on the Short Sea, and that new entry and expansion are unlikely[22]. Consequently, there are likely to be no other purchasers for the Vessels or the MFL business.

7.5 GET considers however that sale of the MFL business or Vessels just to an operator on the Short Sea would be wholly disproportionate, as it would in practice limit choice of a possible purchaser to DFDS. If the CC were to adopt such an approach, that would go materially beyond remedying the SLC identified by the CC.

7.6 Any **divestment remedy would not be reasonable or proportionate** because it would:

7.6.1 impose a drastic and irreversible remedy to address a future SLC scenario where there must inevitably, even on the basis of the CC's own case (which GET strongly disputes), be uncertainty as to whether the CC's assumptions will in fact materialise and/or lead to the SLC outcome which the CC fears;

7.6.2 be inconsistent with the approach of the FCA, which has already adopted a decision in this case;

[21] PFs paragraph 8.125
[22] PFs paragraphs 8.118 and 8.125

7.6.3 cause imminent customer detriment (by reducing operator choice and capacity, and weakening the current competitive constraints imposed by MFL) to alleviate a future SLC risk that may not materialise. GET considers that any divestment remedy would likely lead to higher prices and reduced competition imminently through a reduction in spare capacity;

7.6.4 **misunderstand and ignore the extent to which the Short Sea market is expanding and will continue to expand**. For example, despite the statements in the PFs, after a significant contraction in 2008, there are many signs of an expectation of increased demand for cross-Channel freight services by sea. For example, GET is aware of new estimates issued by the Chamber of Commerce in Calais (Appendix 4) which predict that in 2013:

(a) the passenger market will grow by 11.45% up from 9,385,000 to 10,460,000; and

(b) the freight market will grow by 18.37%, up from 31,620,000 to 37,430,000;

7.6.5 **ignore the financial scale and strength of DFDS as a corporate entity and its incentives to remain operating on the Dover-Calais route**, especially given DFDS' public commitment to expanding its route network and the fact DFDS has identified the Dover-Calais route as one of its strategic priorities[23].

7.6.6 **ignore the extent to which DFDS has already succeeded in expanding** its operation on the Short Sea and especially on the Dover-Calais route, as shown by the following:

(a) DFDS has increased its capacity by about 47% between January 2012 and January 2013 (from 784 sailings in January 2012 to 1,156 sailings in January 2013);

(b) In January 2013, DFDS' share of cars on the passenger market was 20.2%, which is 2.2% higher than in January 2012, despite a 3% market decline and even though MFL did not operate on the route in January 2012. The January 2013 Short Sea market shares indicate that DFDS carried more car passengers than the previous market leader, P&O, and considerably more than MFL (whose passenger share was 3% in January 2013);

(c) DFDS' total freight share in January 2013 was 22.4%, compared to 18.7% in 2012. By comparison, MFL's share of freight was 4.2% in January 2013.

7.7 The reality is that DFDS' opportunities are growing - not least in light of the reduction in capacity by P&O.

7.8 **DFDS' market shares, both in absolute terms and also in terms of growth in the face of MFL's presence as an existing competitor, are entirely inconsistent with the CC's view that DFDS might exit the Dover-Calais route**[24]. For the reasons given above, GET considers that DFDS is a strong competitor and DFDS has itself publicly stated that it is unlikely to exit the Dover-Calais route. GET submits that it would be entirely disproportionate and unreasonable, in the face of these trading figures and taking account of the imminent customer detriment that divestment will cause and the other factors identified above, for the CC to require GET to divest itself of the Vessels or the MFL business.

[23] See GET's response to the annotated issues statement paragraph pages 16 and 17
[24] PFs paragraph 8.76

8. BEHAVIOURAL REMEDIES

8.1 The CC has the statutory power under section 86 of the Act to impose behavioural commitments that concern activity in the UK and on companies that carry on business in the UK. If any remedies are to be required in this case (and GET strongly disputes that any remedies are needed), GET considers that behavioural remedies would be the only reasonable and proportionate requirement. Such an approach would be more likely to be consistent with the existing merger clearance decision of the FCA and could be crafted so as to avoid conflict with the Paris Court's judgment.

8.2 The CC states at paragraph 11 of the Remedies Notice that "*a behavioural remedy such as arrangements to separate the management of Eurotunnel from the management of MFL is.....not considered likely to be effective in constraining the commercial incentives that GET has to increase prices (given its ownership of the MFL business) and would be very difficult to monitor*".

8.3 GET does not see how the CC can perceive this to be the case. The FCA considered that the separation of the sales teams of Eurotunnel and MFL, resulting from its behavioural remedies address such concerns as the FCA had in relation to the Acquisition. GET has previously sought the CC's permission to further reinforce such separation by the transfer to the SCOP of the freight sales team from MFL. Further, there is already separate day-to-day management for each of the MFL and Eurotunnel businesses. The fact that GET has already agreed to, and is complying with, arrangements of the type which the CC considers to be ineffective and difficult to monitor, undermines the CC's assessment of the undertaking arrangements which have been accepted by the FCA. Furthermore, given that the arrangements have already been put in place and are being monitored by the FCA, the usual logistical difficulties which might ordinarily make behavioural remedies less attractive to the CC than structural remedies in the CC's view are not present here.

8.4 In line with the comments in paragraph 8.1 above, if any remedies are needed in this case (which GET strongly disputes), a package of behavioural remedies would:

8.4.1 be consistent with the requirements of Paris Court, and would not result in the voidness that would taint a divestment remedy not expressly sanctioned by the Paris Court.

8.4.2 be consistent with the requirement of the Paris Court's judgment to maintain employment.

8.4.3 maintain the existing level of competition between ferry operators and avoid a situation where P&O and DFDS were the only two ferry operators on the Dover-Calais route.

8.4.4 not lead to unnecessary loss of customer benefits or market distortions of the type that would inevitably result from a divestment remedy.

9. NO RELEVANT CUSTOMER BENEFITS

9.1 The CC states, at paragraph 14 of the Remedies Notice, that it will consider the effects of remedial action on any relevant customer benefits arising from the merger situation, and lists examples of such benefits as:

9.1.1 lower prices – but the CC's preferred option of divestment remedies would actually lead to higher prices,

9.1.2 higher quality or greater choice of goods or services – but the divestment would reduce the number of competing ferry operators on the Dover-Calais route from 3 to 2, reducing customer choice, and

9.1.3 greater innovation in relation to such goods and service – but a divestment remedy will lead to less intensive competition between a smaller number of ferry operators on the Dover-Calais route.

9.2 The **effect of a divestment remedy will be to reduce with imminent effect the number of ferry operators on the Short Sea from three to two**. This will obviously reduce the degree of customer choice in terms of the number of ferry operators providing competing services. Divestment would also reduce, with imminent effect, capacity on the Short Sea, removing an important existing competitive constraint (i.e. MFL) on Short Sea ferry prices and would also risk undermining competition between ferry operators in terms of service quality.

9.3 **The CC proposes reducing customer choice, removing capacity and creating the likelihood for higher ferry prices now. The CC justifies this draconian remedy by reference to a future possible scenario in which prices might rise and/or a ferry operator might, at some stage in the future, exit the Short Sea. The SLC risks identified by the CC are speculative and future, compared to the imminent detriment to customers' interests (see above) that would result from a divestment remedy.**

9.4 Given the above GET is unable to see how it could be argued that a divestment remedy would be to customers' benefit. Conversely, the results received by the CC in response to its own survey (supported by its hearings with certain freight customers) indicate clearly the **benefits for customers of the current market situation**, including MFL as a subsidiary of GET.

9.4.1 Customers do currently multi-source from several operators with most freight volume being "up for grabs" and with a limited share of freight being restricted to a particular mode of transportation (paragraph 2 of the CC's survey response).

9.4.2 It is easy for freight customers to switch supplier – 47% of customers consider it very easy or quite easy to do so (paragraphs 3 and 23 of the CC's survey response).

9.4.3 Freight customers are price sensitive and there "will be likely switching" between Eurotunnel and ferries following a 10% price rise (paragraphs 3 and 24-26 of the CC's survey response).

9.4.4 Freight customers would in principle find attractive a bundled offering combining Eurotunnel and MFL service offerings (paragraphs 4 and 50 of the CC's survey response).

9.5 It is also interesting to note that financial analysts commenting on the PFs have indicated that it is likely to lead to higher prices:

9.5.1 Exane BNP Paribas said it "*may speed up the rationalisation of capacity in the Short Strait market, which is positive for GET (pricing and volume-wise)*", and

9.5.2 RBC Europe said, "*we see a risk that.....the CC ruling may simply end up removing an operator from the market, and end up inadvertently reducing competition and consumer choice*".

10. **CONCLUSION**

10.1 By way of conclusion GET considers that:

10.1.1 section 86 of the Act precludes the imposition by the CC of divestment remedies on GET or MFL SAS.

10.1.2 unless the Paris Court expressly consents to amend its previous judgment, the CC may not;

(a) require divestment of the Vessels or the MFL business at all, or

(b) require divestment of the Vessels to a purchaser that might change the French flag registration of the ferries;

10.1.3 a divestment remedy would be disproportionate and unreasonable, inter alia, because it would be the imposition of a drastic and irreversible remedy to address a future SLC scenario where there must inevitably, even on the basis of the CC's own case (which GET strongly disputes), be uncertainty as to whether the CC's assumptions will in fact materialise and/or lead to the SLC outcome which the CC fears may arise;

10.1.4 any divestment remedy would be detrimental to customers' interests and result in no customer benefits; and

10.1.5 any remedy required by the CC other than behavioural remedies of the type already accepted by the FCA would result in a clear inconsistency of approach and conflict with the decision of the FCA.

5 March 2013

APPENDIX 1

Inconsistencies of the PFs with the findings of the FCA

1. **COUNTERFACTUAL**

1.1 The CC considers that the relevant counterfactual is the situation where DFDS would have acquired two Vessels from SeaFrance (those that were acquired by GET) and would have used them to replace ferries it currently charters to operate on the Dover-Calais route. The CC notes that another possible counterfactual would be that DFDS would have acquired only one of these two Vessels but would have chartered the other one from its acquirer.

1.2 The FCA did not adopt the same counterfactual. It even noted that a situation that would have resulted from another decision of the Paris Court was not a relevant counterfactual since it was a hypothetical situation (paragraph 41 of the FCA's decision). Instead, the FCA considered two alternative counterfactuals. The first one was the situation before SeaFrance exited the market. The second one was the situation after SeaFrance exited but before MFL launched its services.

1.3 It is also important to stress that the counterfactual scenario built by the CC is at odds with several elements brought before the Paris Court that ruled on the offers made for the acquisition of SeaFrance's assets.

1.3.1 Firstly, the liquidator that was appointed by the Court, and whose opinion was followed entirely by it, mentioned that if GET's offer were to be rejected by the Court, an auction should take place (cf. the report drafted by M. Gorrias for the Paris Court, page 16); this suggests that the outcome of approach 2 of the CC is probably mistaken.

1.3.2 Secondly, it is stated by the expert Parimar Francharte named by the Court in its report to the Court-appointed liquidator (M. Gorrias) that a piecemeal auction sale would achieve better result than selling two Vessels to the same buyer (page 4 of the report); this suggests that absent GET's offer, an auction was a viable – and likely – solution for the Paris Court.

1.3.3 Thirdly, the CC considers it unlikely that any additional interested party would have manifested itself if an auction process had been launched but several documents in the possession of the Paris Court suggest otherwise: the Parimar Francharte report states (page 5) that TEF had shown an interest in the Nord Pas de Calais when it understood DFDS' offer didn't cover that ship. The same report states (page 7) that one reason why P&O didn't submit any offer was the several communications that were made before the submission of the offers and that suggested that the acquisition prices would be much higher than those actually offered; once the initial offers known, P&O and others could have been interested in placing an offer for some assets.

2. **THEORY OF HARM**

2.1 The CC's theory of harm rests for a large part on the CC's belief that, in the long run, DFDS will (likely) exit the Dover-Calais route because this route cannot sustain three different ferry operators.

2.2 The FCA did not consider at all this sort of speculative assumption. It analysed the possibility that the Acquisition would generate unilateral effects as well as the risk that it would allow GET to implement anticompetitive practices that could lead to the exclusion of a competitor. But it did not consider that the Acquisition could lead to a level of overcapacity that could lead to the exit of an operator.

2.3 It should be noted that, in an interview published on 1st March 2013 (see Appendix 3), DFDS' CFO, Jean-Claude Charlo, contradicted the theory developed by the CC. Mr Charlo demonstrated there has been fast growth on the part of DFDS in recent months: between February 2011 and March 2013, freight volumes have been multiplied by a factor of six. Furthermore, Mr Charlo states that (i) even though DFDS did not purchase SeaFrance's Vessels, its strategy in the Channel remains unaltered, since it is a long term one, that (ii) this activity will be supported by the DFDS group and that (iii) DFDS will "certainly not" exit the market.

3. DIFFERENTIATION OF THE CROSS-CHANNEL SERVICES

3.1 The CC presents a vision of the differentiation and positioning of the different passenger and freight services in the Short Sea that seems inconsistent with the FCA's view. While the Dover-Dunkirk route has been included in the relevant market defined in the PFs, the CC explains that this route exerts no material competitive constraint on the Dover-Calais route (PFs paragraph 7.61). Given this, the CC decides to focus its competitive analysis on the Coquelles-Folkestone and Dover-Calais routes. This suggests that, according to the CC, the services provided by DFDS on the Dover-Dunkirk route would be very differentiated from those provided by Eurotunnel and the ferry operators that are active on the Dover-Calais route. Except for this differentiation, the CC apparently refuses to take account of differentiations that would be based on the quality of services and the number of crossings. In particular, when considering diversion ratios from Eurotunnel to MFL, the CC does not consider these factors and explains that (relative) market shares are a good proxy.

3.2 On its side, the FCA adopted a different position. It noted that the market at hand was a differentiated market, but contrary to the CC, it did not consider that the Dover-Dunkirk route was particularly differentiated from the other services. It first noted that a significant differentiation existed between ferry services and Eurotunnel services and then considered that the passenger and freight services were also differentiated based on the frequency of crossings offered by the operators (paragraph 51). The CC used events that occurred on the market to determine who is the closest competitor of Eurotunnel. The FCA did not calculate formal diversion ratios and placed more emphasis on determining the identity of the closer competitor of Eurotunnel (paragraphs 52 to 56).

4. SPARE CAPACITIES

4.1 When examining unilateral effects, the CC does not draw conclusions from the existence of spare capacities, neither in the current situation nor in the counterfactual situation. The CC simply concludes from GUPPI and IPR calculations that the Acquisition was expected to lead to a significant price increase by Eurotunnel. It does not seem to consider that competitors' spare capacities would be sufficient to prevent such a price increase.

4.2 By contrast, the FCA conducted a very careful analysis of overcapacities, differentiating peak and non-peak situations. The FCA calculated that average capacity utilisation of ferry operators was between 50% and 75% (paragraph 58). It noted that this ratio could be higher at some points during the year but considered that these peaks would not allow Eurotunnel to increase its prices. This is so because on the freight market, contracts with the customers are concluded on a yearly basis and ferry operators do not experience capacity constraints at exactly the same time. On the passenger market, the FCA noted that ferries offered a high enough frequency of services so that passengers could substitute ferry for Eurotunnel services, possibly by slightly shifting their departure time (paragraphs 60-65). The FCA concluded from these findings that spare capacities were such that unilateral effects were unlikely to occur following the Acquisition. This conclusion implicitly recognizes the high elasticity of the demand for Eurotunnel services. Given this high elasticity and the existence of significant spare capacities of competitors, a price increase of Eurotunnel would be unprofitable (the volume Eurotunnel would lose would be above its critical loss).

5. BUNDLING

5.1 The CC does not consider bundling as a major concern. It notes that bundling practices could be one element of the theory of harm it describes, which is based on the assumption that one of the ferry operators is likely to withdraw some or all of its services from the Short Sea (PFs, Appendix E). But the CC recalls that GET is currently restricted in its ability to bundle services across its Eurotunnel and ferry operations by undertakings it has given to the FCA (PFs paragraph 5.59) and concludes that bundling is unlikely to have a material impact on competition on the short sea in the short to medium term.

5.2 The FCA investigated the possibility that following the Acquisition, GET could implement anticompetitive bundling practices. Given the lack of examination time and in order to avoid a second-phase merger review, GET agreed to give undertakings which alleviated possible bundling issues.

COMPARISON OF THE PFS WITH THE FINDINGS OF THE PARIS COURT

Beyond the clear incompatibility of the PFs with the judgment of the Paris Court in terms of end-result, several inconsistencies exist in the reasoning between the two bodies.

6. INCOMPATIBILITY OF END-RESULT

6.1 The PFs suggests that the CC will order the divestment of the Vessels and the termination of the service contract entered with the SCOP. On its part, the Paris Court has ordered GET not to divest the ships for a duration of 5 years at least. There is therefore a clear incompatibility in that GET cannot respect one decision without violating the other.

6.2 The only way out would be for GET to seek to lift the sale prohibition ordered by the Paris Court. Article L. 641-10 of the French Commercial Code states that such lift may be requested of the Court, but the Court may decline, authorise upon the satisfaction of the certain conditions, or authorise unconditionally. Nothing, at law, forces the Court to take into account the PFs or even the final decision of the CC. Given that in such a case the representative of the French State would have to be consulted by the Court and that the order sought by the CC would have severe employment consequences, the French State may well advise against lifting the ban or at least request guarantees that may well be contrary to the order sought by the CC (keeping the French flag on the Vessels, etc.).

6.3 It stems from the above that the clear incompatibility brought upon GET by the lack of communication between the OFT, the CC and the FCA, may only be lifted if the Paris Court unconditionally agrees to forego the requirement it imposed on GET, which is unlikely to be favoured by the French State.

7. INCONSISTENCIES OF REASONING

7.1 Several elements of the Paris Court judgment contradict the theory of the CC. Only the most serious inconsistencies are outlined below:

7.2 Regarding the counterfactual:

7.2.1 The liquidator that was appointed by the Court, and whose opinion was followed entirely by it, mentioned that if GET's offer were to be rejected by the Court, an auction should take place (cf. report drafted by M. Gorrias for the Paris Court, page 16); this suggests that approach 2 of the CC to determine the counterfactual is mistaken.

7.2.2 The CC does not take correct account of a major flaw – in the Paris Court's view – of DFDS' offer: the fact that, contrary to a requirement of the applicable *cahier des charges*, DFDS refused to indicate clearly which flag it intended to fly on the boats shows clearly that it won't be the French one, which has negative employment and tax consequences. Similarly, DFDS has consistently refused to make any employment-related commitment, a criterion very clearly taken into account by the Court in its final decision. This means that for many reasons, the Court would <u>not</u> have declared DFDS winner of the bid, contrary to approaches 2 and 3 of the CC's counterfactual.

7.2.3 It is stated by the expert Parimar Francharte named by the Paris Court in its report to M. Gorrias that a piecemeal auction sale of the Vessels would achieve better result than selling two ships to the same buyer (page 4 of the report); this suggests that absent GET's offer, an auction was a viable – and the most likely – solution for the Paris Court.

7.2.4 The CC considers it unlikely that any additional interested party would have entered the bidding process if an auction process had been launched but **<u>several documents in the possession of the Paris Court suggest otherwise</u>**: the Parimar Francharte report states (page 5) that TEF had shown an interest in the Nord Pas de Calais when it understood DFDS' offer didn't cover that ship. The same report states (page 7) that one reason why P&O didn't submit any offer was the several communications that were made before the submission of the offers and that suggested acquisition prices much higher than those actually offered; once the initial offers known, P&O and others could have been interested in placing an offer for some assets.

7.3 <u>Regarding the substantive analysis:</u> The Parimar Francharte report suggests that GET could start a price war if its offer were successful; the theory of harm elaborated by the CC suggests the opposite (weak price competition of MFL).

APPENDIX 2

Cooperation between NCAs in merger control proceedings

To avoid the risk of national competition authorities adopting divergent approaches on mergers outside the EUMR, the European Council insists on a close cooperation between National Competition Authorities: "*The Commission and the competent authorities of the Member States should together* ***form a network of public authorities****, applying their respective competences* ***in close cooperation, using efficient arrangements for information- sharing and consultation,*** *with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible."*[25]

The Commission Notice on case referral in respect of concentrations[26] reiterates this idea: "*Article 19(2) of the Merger Regulation provides that the Commission is to carry out the procedures set out in that Regulation in close and constant liaison with the competent authorities of the Member States (the NCAs).* ***Cooperation and dialogue between*** *the Commission and the NCAs, and between the* ***NCAs themselves****, is particularly important in the case of concentrations which are subject to the referral system set out in the Merger Regulation."*

To fulfill this ambition of cooperation, an EU Merger Working Group was created in 2010 consisting of representatives of the European Commission and the national authorities. As explained on the European Competition Network website: "*The objective of the Working Group is to* ***foster increased consistency, convergence and cooperation among EU merger jurisdictions***."[27]

This Working Group has adopted in 2011 the Best Practices on Cooperation between EU National Competition Authorities in Merger Review[28], a set of guidelines for NCAs, that focus on the problem of multi-jurisdictional mergers that cannot benefit from a referral to the Commission.

These Best Practices set out situations where cooperation between NCAs would be particularly relevant. It states for example the cases where[29]:

- *"multi-jurisdictional mergers raise* ***similar or comparable issues in relation to jurisdictional or substantive questions****"*
- the mergers *"may have* ***an impact on competition in more than one Member State****"*
- *"markets affected by the transaction cover more than one Member State"*

In order to "*reach informed and consistent or at least* ***non-conflicting outcomes***"[30], the NCAs involved in those multijurisdictional mergers are strongly invited "*to exchange views*" on their substantial analysis: "*market definition, assessment of competitive effects, efficiencies, theories of competitive harm, and the empirical evidence needed to test those theories*", and also on the "*necessary remedial measures"*[31].

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[25] Council Regulation n°139/2004, para. 14
[26] Commission Notice on case referral in respect of concentrations, OJEU 05/03/2005, C 56/02, para. 53
[27] http://ec.europa.eu/competition/ecn/mergers.html
[28] Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 08/11/2011, http://ec.europa.eu/competition/ecn/mergers.html
[29] Best Practices Point 3.2.
[30] Best Practices Point 2.2.
[31] Best Practices Point 4.3.

APPENDIX 3

Copy newspaper articles re DFDS

APPENDIX 4

Estimates of Calais Chamber of Commerce re growth in cross-Channel freight

APPENDIX 5

Some key messages from DFDS' Annual Report and Accounts for the financial year ended 31 December 2012

Strong financial performance

"*Our strong cash flow of DKK 0.9bn shows that DFDS is a robust business, even in a headwind... we are in a strong position and we aim to grow further through acquisitions during 2013 to strengthen and expand our European network."*

4th paragraph, DFDS news and press 28th February 2013

Volumes in the ferry market

"At the end of 2012, DFDS' market share on the Dover Strait had increased to 20% from 15% in 2011. The market share of the ferry market was one third in 2012. Freight rates were overall on a level with 2011 in 2012."

Page 27, 3rd paragraph, ***Channel,*** DFDS Annual Report 2012

"At the end of 2012, DFDS' market share on the Dover Strait had increased to 16% from 12% in 2011. The market share of the ferry market was 30% in 2012. Some improvement in average seafare per passenger and spending onboard was achieved in 2012."

Page 27, 4th paragraph, ***Channel,*** DFDS Annual Report 2012

Operations on the Dover-Calais route

"...despite the headwind, we did not lose our momentum in 2012. On the contrary, we continued the strategic expansion of the network with the opening of a new route between Dover and Calais..."

Page 5, 2nd paragraph of ***DFDS expands despite challenges***, DFDS Annual Report 2012

"The Shipping Division's revenue increased by 2.8% to DKK 8,015m, driven by an increase of DKK 425m in Channel. The start of a new route, Dover-Calais, increased revenue by DKK 287m, and the addition of two routes from LD Lines contributed DKK 128m."

Page 62, 2nd paragraph of ***Revenue***, DFDS Annual Report 2012

One of DFDS' priorities for 2013 is to *"make acquisitions to strengthen and expand the network."*

Page 8, Number 3, ***Priorities 2013***, DFDS Annual Report 2012

"DFDS transported 12.5% more lane metres of freight in 2012 due to the opening of a route between Dover and Calais in February".

Page 12, 2nd paragraph of ***Operations and Finances***, DFDS Annual Report 2012

The number of passengers rose by 15.9%, also primarily due to the opening of a route between Dover and Calais in 2012".

Page 12, 3rd paragraph of ***Operations and Finances***, DFDS Annual Report 2012

2013 Financial Forecast

"In 2013, Channel's operating profit is expected to improve as operations are integrated and stabilised."

Page 27, 5th paragraph, ***Channel,*** DFDS Annual Report 2012

"New investments should...deliver returns of at least 10%"

Page 9, 2nd paragraph of ***Return on Invested Capital***, DFDS Annual Report 2012

DFDS' key data for 2013

"*Revenue: Expected to increase by around 5%, driven by the full-year effect of the acquisition of LD Lines and the start of the Dover–Calais route*"

Page 15, 5th paragraph of ***Profit Expectations 2013***, DFDS Annual Report 2012

APPENDIX 6

Short Sea market share statistics for January 2013

Car

Operator	Eurotunnel	P&O Ferries	DFDS DO/DUNK	DFDS DO/CA	MyFerryLink	Total	Ferries
Size	132,393	45,434	29,407	17,766	8,714	233,714	101,321
vs. Year-1	-1.3%	-24.8%	-36.5%	-	-	-3.0%	-5.0%
Share	56.6%	19.4%	12.6%	7.6%	3.7%	100.0%	43.4%
vs. Year-1	+0.9 Pts	-5.6 Pts	-6.6 Pts	+7.6 Pts	+3.7 Pts	+0.0 Pts	-0.9 Pts
Size YTD	132,393	45,434	29,407	17,766	8,714	233,714	101,321
vs. Year-1	-1.3%	-24.8%	-36.5%	-	-	-3.0%	-5.0%
Share YTD	56.6%	19.4%	12.6%	7.6%	3.7%	100.0%	43.4%
vs. Year-1	+0.9 Pts	-5.6 Pts	-6.6 Pts	+7.6 Pts	+3.7 Pts	+0.0 Pts	-0.9 Pts

Coach

Operator	Eurotunnel	P&O Ferries	DFDS DO/DUNK	DFDS DO/CA	Total	Ferries
Size	3,349	2,702	105	200	6,356	3,007
vs. Year-1	+28.3%	-0.7%	+183.8%	-	+18.4%	+9.0%
Share	52.7%	42.5%	1.7%	3.1%	100.0%	47.3%
vs. Year-1	+4.1 Pts	-8.2 Pts	+1.0 Pts	+3.1 Pts	+0.0 Pts	-4.1 Pts
Size YTD	3,349	2,702	105	200	6,356	3,007
vs. Year-1	+28.3%	-0.7%	+183.8%	-	+18.4%	+9.0%
Share YTD	52.7%	42.5%	1.7%	3.1%	100.0%	47.3%
vs. Year-1	+4.1 Pts	-8.2 Pts	+1.0 Pts	+3.1 Pts	+0.0 Pts	-4.1 Pts

Truck

Operator	Eurotunnel	P&O Ferries	DFDS DO/DUNK	DFDS DO/CA	MyFerryLink	Total	Ferries
Size	113,247	90,249	34,907	27,091	11,734	277,228	163,981
vs. Year-1	-3.8%	-9.1%	-30.3%	-	-	+3.8%	+9.8%
Share	40.8%	32.6%	12.6%	9.8%	4.2%	100.0%	59.2%
vs. Year-1	-3.2 Pts	-4.6 Pts	-6.1 Pts	+9.8 Pts	+4.2 Pts	+0.0 Pts	+3.2 Pts
Size YTD	113,247	90,249	34,907	27,091	11,734	277,228	163,981
vs. Year-1	-3.8%	-9.1%	-30.3%	-	-	+3.8%	+9.8%
Share YTD	40.8%	32.6%	12.6%	9.8%	4.2%	100.0%	59.2%
vs. Year-1	-3.2 Pts	-4.6 Pts	-6.1 Pts	+9.8 Pts	+4.2 Pts	+0.0 Pts	+3.2 Pts