

Suggested remedies concerning GET's acquisition of certain assets of former Sea France**1. DIVESTITURE OF THE BUSINESS**

- 1.1 DFDS endorses the Competition Commission's (CC) view that the divestiture of the MyFerryLink (MFL) business or the assets employed in the business, including the vessels *Berlioz*, *Rodin* and *Nord Pas de Calais* (the Vessels), is likely to be the most effective and complete remedy in addressing the SLC.
- 1.2 DFDS shares the CC's definition of the business as including, but not limited to, (a) the Vessels owned by subsidiaries of GET and (b) the benefit of a contract entered into between MyFerryLink SAS, a subsidiary of GET, and the Société coopérative et participative (SCOP) for the operation of the Vessels on the short sea. In addition, DFDS considers that the business includes all the assets, tangible and intangible that the GET group acquired from former Sea France including but not limited to the brand and trade name, computer software, websites, domain names, IT systems, customer records, the inventory of technical and spare parts and IT hardware.
- 1.3 DFDS is of the view that the MFL business is not a viable business and as such will not be of interest to a buyer genuinely independent of the GET group. This is consistent with the views presented at the time of DFDS's bid in 2011 for the then existing SeaFrance business. One or more of the Vessels may be important assets for a short sea operator that has the required economies of scale, whether on the short sea or elsewhere, to make the operation on Dover – Calais route profitable. For this reason, DFDS believes that GET should be required to offer as alternatives, and any purchaser should be at liberty to acquire, either one or more of the Vessels and such other assets as a prospective buyer may require, or the MFL business as a whole, provided that:

- (a) GET is required to divest at least the *Berlioz* and the *Rodin* and
- (b) MFL ceases all operations.

This would make it possible for different purchasers to acquire distinct assets. This would also to the widest possible degree put a prospective buyer in the situation such buyer would have been in, if GET had not acquired the Vessels and certain other assets of SeaFrance. It is noted that the Vessels were offered for sale on an individual as well as an aggregate basis and that such auction was separate from an auction of the other assets of SeaFrance.

- 1.4 The period, within which the divestment of at least Berlioz or Rodin as well as the cessation of the MFL operations must take place, must end before 1 July 2013.

2. THE GET GROUP SHALL NOT ENGAGE IN OR SUPPORT ANY FERRY ACTIVITY IN THE SHORT SEA

- 2.1 In order to ensure the long-term effectiveness of the above remedy and avoid any risk of their circumvention, the remedies must include a prohibition on the GET group from:
- (a) operating, directly or indirectly, a ferry business, or
 - (b) supporting, by financing, chartering or buying vessels or by any other means whatsoever, directly or indirectly, another ferry operator

on the short sea for a period of ten years following the final decision of the CC.

3. **MONITORING TRUSTEE**

- 3.1 Between the time of the final findings of the CC until the divestiture of the business, the GET group must honour the interim undertakings as set forth in the document "Eurotunnel interim undertakings" issued by the CC on 30 November 2012 and maintain in place the monitoring trustee as set forth in the document "Directions to appoint a monitoring trustee" issued by the CC on 21 December 2012. These safeguarding measures should be maintained in place to ensure that the SLC does not increase in the transition period between the final findings and the divestment of the MFL business and assets as provided for in 1 above.

If the CC in its final decision would retain the obligation of a divestment of the MFL business, the period between this final decision and the divestment should include a prohibition on the GET group providing any financial support, directly or indirectly, to MFL including but not limited to e. g. buying space on MFL.

4. **DIVESTITURE TRUSTEE**

- 4.1 The CC should appoint a divestiture trustee to oversee the divestment. A swift divestiture is crucial to the efficiency of the remedies of this case; the GET group should therefore not be granted an initial period in which to pursue the divestment by its own means and should not be allowed an initial period to allow for a sale of the MFL business as a whole followed by a period for a sale of individual assets, including one or more of the Vessels.
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REASONS

5. **ON 1. ABOVE - THE SCOPE OF THE DIVESTURE OF THE MFL BUSINESS**

In order to be effective in addressing the SLC caused by the merger, the divesture must include the entire MFL business including the three Vessels. However, any individual purchaser should not be required to buy all of the MFL business or assets. We base this opinion on the grounds set forth below.

5.1 **The Vessels**

DFDS supports the CC's view that GET should be required to divest the entire MFL business or its assets. In order to allow for the possibility of a new entrant on the short sea, the business (including the benefit of the contract with the SCOP) should be offered for sale, but in practice DFDS is doubtful that any potential, independent, new entrant would regard the MFL business as capable of generating profits given its high costs as a single route operator with only two vessels as well as the weakness of the short sea market in the foreseeable future. For this reason, DFDS believes that the MFL assets should also be offered for sale piecemeal.

According to the CC's analysis, at least two vessels are required to run a competitive and thus economically viable ferry operation on the Dover-Calais route.¹ For this reason, the

¹ See p. 99, para. 8.22 of the provisional findings.

GET should be required to divest at least the ROPAX vessels, *Berlioz* and *Rodin*. If MFL was able to keep two of its three vessels and if it was allowed to continue operating, there is a risk that it could continue to run a ferry operation on the short sea for reasons unrelated to the pursuit of a bona fide arm's length business.

Given that the assets, if sold piecemeal, could be sold at different times and some may not be attractive to a purchaser at all (such as the freight vessel *Nord Pas de Calais*), DFDS believes that the GET group should also be required to refrain from all ferry operations on the short sea *pending* the sale of the assets. This should include a prohibition on the GET directly or indirectly supporting a ferry operation on the short sea other than the continued chartering of the Vessels to the SCOP on un-amended terms until a sale of the Vessels has been effected but in any event not beyond 1 July 2013.

DFDS considers that this remedy should be implemented before the summer holiday season commences, that is by 1 July 2013.

5.2 The SCOP

DFDS believes it is crucial that under the prevailing, very tough market conditions for ferry companies operating on the short sea, the acquirer must have the right to decide on an individual basis which personnel belonging to the SCOP it would engage, if any. If the acquirer were required to take over MFL's contract with the SCOP, this can be expected to have a negative impact on the acquirer's ability to run a competitive ferry operation on the Dover-Calais route and thus impede the effectiveness of the undertakings foreseen by the CC to address the SLC. Moreover, if the acquirer is already present on the short sea, an obligation on it to take over MFL's contract with the SCOP would result in the acquirer needing to lay off its own personnel.

5.3 Suitable purchaser of one or more of the Vessels

DFDS is a well-established and financially sound company with ample experience in the shipping industry. The divestment of one or more of the Vessels to DFDS would result in maintaining the competitive environment on Dover-Calais and at the same time increase service quality in the form of further choice for customers and more frequent departures. As is evident from DFDS's bid for certain assets of former Sea France submitted to the French Court, DFDS has already put in place a credible business plan for the operation of the Vessels on the short sea. DFDS agrees with the CC's view that P&O would not be a suitable third party to acquire the business. P&O's strong market position and market power on the Dover–Calais route makes it an unsuitable purchaser. Consequently, we believe that a divestment to DFDS would allow for the most effective and comprehensive alternative in addressing the adverse effects of the merger.

5.4 MFL should not be allowed to charter the vessels

DFDS is of the opinion that allowing MFL to charter the Vessels to a third party ferry operator (independent of GET) would not constitute a clear-cut and comprehensive solution to the SLC. DFDS believes that due to GET's position on the short sea and its interest in maintaining its market position without lowering prices, there is a risk that MFL would abuse a right to charter the Vessels by imposing conditions on the charter agreements so as to prevent the charterer from competing effectively on the short sea. Such conditions could include high charter prices and/or unfavourable termination

clauses. For this reason, GET should be required to divest the business or assets outright.

6. ON 2 ABOVE - GET SHOULD NOT OPERATE A FERRY BUSINESS ON THE DOVER- CALAIS STRAIT

As stated above, GET should now be allowed to engage in any ferry activities, directly or indirectly, on the Dover – Calais route for 10 years following the final findings of the CC. We base this opinion on the following reasons.

6.1 Competitive Restraints

Several analyses by independent third parties, from established equity groups², to GET's own views³ and the CC's provisional findings⁴, confirm that the Dover–Calais route cannot support three ferry operators. The CC also concluded that ferry operators on the Dover-Calais route exercised greater competitive constraints on each other than they did on the Eurotunnel and vice versa. Therefore, the CC concluded that it would be better from a competition perspective that an *independent* party of the GET group rather than an operator connected with Eurotunnel operates as the second ferry operator on the Dover – Calais strait. A ferry operator linked to the GET group has less incentive to compete over e.g. prices with other ferry operators in order to obtain larger market shares.

DFDS considers that this prohibition should remain in place for a sufficiently long period of time to enable demand to develop to the point where the market could support three ferry operators. Given the forecasts that freight and passenger volumes will develop only slightly, if at all, over the coming years, DFDS believes that 5 years is insufficient and that the duration of this remedy should be 10 years.

7. On 4. Above - Divestiture trustee

DFDS is aware that it is the CC's usual approach to allow the merger parties an initial period of time in which to secure the sale of a divestiture package to a suitable purchaser, and only to require the appointment of a divestiture trustee should they fail to do so. However, we consider that the circumstances of this case are such that the sale of the business should be conducted by a divestiture trustee from the outset where the timing of the divestment is essential to sustain the effectiveness of the remedies.

Further, DFDS believes that the appointment of a divestiture trustee is required to ensure that an effective remedy is being implemented on non-discriminatory terms. DFDS is concerned lest GET seek to implement the divestment by selling to an acquirer that would exercise less competitive restraints on GET.

² See the e.g. the Nordea equity research report dated 10 September 2012 and Exane BNP Paribas' equity research report dated 24 October 2012 cited by the CC in appendix G, p. 4-5, see also p. 21 of the provisional findings.

³ See commentary prepared by Exane BNP Paribas following a discussion with GET dated 24 May 2012 according to which GET had stated that one of the rationale behind GET's acquisition of Sea France was to "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", cited by the CC on p. 24 of the provisional findings.

⁴ See conclusion that demand on the short sea is not big enough to support three ferry operators on the Dover-Calais route 8.38 and that DFDS is most likely to exit 8.74.