



## Completed acquisition by Groupe Eurotunnel S.A. of certain assets from SeaFrance S.A.

### Initial Response from SCOP to CC Notice of Possible Remedies

#### 1. Executive Summary

- 1.1 This Initial Response provides the SCOP's preliminary views on the Competition Commission's ("CC") notice of possible remedies; the SCOP will be responding separately to the CC's provisional findings.
- 1.2 In short, the SCOP does not agree with the conclusions reached by the CC in the provisional findings and considers that the entry of the MyFerryLink business ("MFL") has been a pro-competitive event which has resulted in an increase in the number of ferry operators from 2 to 3. Further, the SCOP does not accept the CC's conclusions on capacity or on the likelihood of exit by DFDS. Consequently, the SCOP does not consider any remedy to be necessary.
- 1.3 Nevertheless, without prejudice to the SCOP's response to the provisional findings, we have set out in the remainder of this submission the SCOP's views on the CC's Notice of possible remedies and possible alternative practicable remedies.
- 1.4 In summary:
  - The SCOP is entirely independent of GET, tied only by the terms of the [X] bareboat charter and commercial operation agreement entered into with MFL SAS.
  - In practice, all sales and operational activities of MFL fall under the responsibility of Jean Michel Giguët (Chief Executive Officer) and Raphael Doutrebente (Deputy Chief Executive Officer) of the SCOP.
  - Functional separation of the commercial teams of the Eurotunnel shuttle business and MFL are reinforced by undertakings already given to the French Competition Authority ("FCA") which are themselves subject to independent monitoring.
  - The CC must take account of the French court order which granted the Vessels to GET in the first place. This makes clear that any divestment or long-term charter by GET would be void and that the SCOP's rights to operate the Vessels are inextricably linked to the decision to award the sale to GET.
  - In addition to the costs associated with SCOP, the CC must be aware of the fiscal liability which would arise on any change from the current French flag registration of the Vessels.
  - In contrast to the launch of MFL which led to a pro-competitive **increase** in the number of operators from 2 to 3, the CC's proposed divestment remedy would lead to an imminent **reduction** from 3 to 2.
  - Any remedy considered by the CC must be consistent with the decision already reached by the FCA and must take into account the practical implications of the remedy imposed by the FCA, including the pre-existing monitoring obligations on GET.

- Any remedy proposal must therefore respect all of the following:
  - The order of the French Tribunal de Commerce that the Vessels are "*inaliénables*" for a period of 5 years; and
  - SCOP's long-term rights and benefits to operate the Vessels (i.e. as a minimum those set out in the agreement with MFL SAS); and
  - A commitment to keep the Vessels operating under the French flag.

## 2. CC's Provisional Findings

- 2.1 The CC has provisionally concluded that the transaction has resulted in the creation of a relevant merger situation and that the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition ("SLC") in the markets for transport services to passengers on the short sea and for transport services to freight customers on the short sea.
- 2.2 The CC has further provisionally concluded that this SLC could be expected to lead to an increase in prices charged both by Eurotunnel and ferry operators in the two relevant markets, and/or a worsening of service quality, for example through reductions in service frequency.
- 2.3 In its Notice on possible remedies, the CC considers that the "*divestiture of the MyFerryLink ("MFL") business or the assets employed in the business, including the vessels, Berlioz, Rodin and Nord Pas-de-Calais (the "Vessels"), is likely to be effective in addressing the SLC*"<sup>1</sup> and that such a remedy "*is likely to be a comprehensive solution to all aspects of the SLC. This is because the adverse effects that we identify arise as a result of GET operating the MFL business and shuttle services through the Channel Tunnel*"<sup>2</sup>.
- 2.4 The CC further considers that "*behavioural remedies are unlikely to be effective in addressing the SLC and its resulting adverse effects*"<sup>3</sup>.
- 2.5 The SCOP does not agree with the conclusions reached by the CC in the provisional findings and considers that the entry of MFL has been a pro-competitive event which has resulted in an **increase** in the number of ferry operators from 2 to 3. By contrast, the CC's proposed divestment remedy would lead directly to a **reduction** in the number of ferry operators across the short sea from 3 to 2 to the detriment of consumer choice.
- 2.6 In other words, to address hypothetical potential future concerns about competition on the short sea, the CC's proposed remedy will give rise to an immediate reduction in choice and capacity. It is difficult to see how such a remedy could meet the required test of being a reasonable and proportionate remedy to the CC's identified concerns.
- 2.7 Further, the SCOP does not accept the CC's conclusions on capacity or on the likelihood of exit by DFDS. Consequently, the SCOP does not consider any remedy to be necessary. The SCOP will expand on its views on the CC's Provisional Findings in a separate submission to the CC.
- 2.8 The remainder of this paper provides further background information on the SCOP, its management and operation of MFL and the critical need for the CC to understand the implications of the French Tribunal de Commerce order on any remedy proposal.

<sup>1</sup> CC Notice of possible remedies, paragraph 5.

<sup>2</sup> CC Notice of possible remedies, paragraph 7.

<sup>3</sup> CC Notice of possible remedies, paragraph 9.

2.9 Finally, sections 4 and 5 provide the SCOP's views on the CC's proposed divestment remedy, on the viability of certain alternative remedies discussed at its hearing with the CC on 28 February and on alternative possible remedies, including behavioural remedies, which the SCOP considers would be reasonable, proportionate and capable of effective implementation should the CC's final report reach the same conclusion on an SLC as that identified in the Provisional Findings.

### 3. **Background**

#### *SCOP is independent of GET*

3.1 The SCOP is a workers co-operative formed in December 2011 by a group of former SeaFrance workers with the aim of making a bid to acquire and/or run the Vessels. Having had its own bid rejected at the beginning of January 2011, the SCOP began discussions with GET, ultimately resulting in SCOP's agreement with GET to operate the Vessels subject to GET's bid for the Vessels being accepted by the Tribunal de Commerce.

3.2 Every worker participating in the SCOP effectively donates [redacted] of their salary in exchange for their shareholding in the SCOP and their right to participate in the venture. GET has no shareholding or other equity interest in the SCOP and no presence on any of the key decision-making functions or managerial boards.

3.3 This unique structure has enabled the SCOP to generate more than 500 jobs from scratch in Calais (an area with one of the highest levels of unemployment in France) and around a further [redacted] jobs in the UK through Dover Calais Ferries Limited ("DCF"), a UK entity wholly owned by SCOP.

3.4 SCOP has entered into two separate contractual arrangements with GET. Under the first, SCOP has acquired bareboat charters of the Vessels from the relevant subsidiaries of GET. Under the second, SCOP has entered into a commercial operational agreement with MFL SAS (itself a 100% subsidiary of GET) to crew and operate the Vessels (the "Commercialisation Agreement").

3.5 At the hearing on 28 February, the CC asked for confirmation of the nature of the exclusivity and termination provisions under the Commercialisation Agreement. These are summarised below:

- The Commercialisation Agreement was entered into for a term of [redacted].
- Article 20 sets out the general termination rights. These include:
  - [redacted]

3.6 Clearly the effect on SCOP of any termination of the Commercialisation Agreement would be catastrophic, in all likelihood leading to the end of the SCOP project, with the loss of all [redacted] employees based in the UK and France.

#### *SCOP has de facto responsibility for MFL*

3.7 In practice, DCF is responsible for the marketing and sales of passenger services (on behalf of MFL), while freight services are currently sold direct by MFL SAS. The SCOP retains the revenues from on-board catering and concession sales, subject to payment of commission back to MFL SAS under the terms of the Commercialisation Agreement.

- 3.8 Under the terms of commitments given to the FCA in November 2012, GET is required to ensure that separate commercial teams are responsible for setting freight prices for each of GET's Le Shuttle and MFL ferry services.
- 3.9 In practice, all sales and operational activities of MFL fall under the responsibility of Jean Michel Giguet (Chief Executive Officer) and Raphael Doutrebente (Deputy Chief Executive Officer) of the SCOP.

*Launch of MFL is pro-competitive*

- 3.10 As a result of the unique alliance between the SCOP and GET, MFL began operations on the Dover-Calais route in August 2012. This resulted in an **increase** in choice for customers and an **increase** in the number of ferry operators on both the wider short sea and the Dover-Calais route itself from 2 to 3.
- 3.11 After a slow start, MFL is now beginning to gain customer trust and with the launch of services of the third ship (*Nord-Pas-de-Calais*) in February of this year, MFL is able to offer sufficient frequency to begin to attract increasing levels of freight custom and to prove that it is a viable alternative to DFDS and P&O on the short sea routes.
- 3.12 For example, in January 2013 MFL carried [X] lorries – more than the [X] carried [X]. In February, the figure is yet higher, at [X] lorries – an increase of just under [X] from January 2013.

*Role of the SCOP is integral to the operation of the Vessels*

- 3.13 The order of the French Tribunal de Commerce to award the sale of the Vessels to GET clearly states that the court's task was not simply to raise money in a sale of assets for the benefit of creditors, but also to ensure, so far as possible, the creation of employment. The ultimate order of the French Tribunal to sell the Vessels to GET is therefore inextricably linked to the commitment to operate the Vessels by the SCOP and under a French flag.
- 3.14 As a result both of the fact that GET's purchase price was below the expected fair value of the assets and the commitment to work with the SCOP to operate the Vessels, the French Tribunal de Commerce has declared that the Vessels are "*inaliénables*" for a period of five years. SCOP has taken separate advice from its French lawyers that this means:
- (i) Any sale of the Vessels would be void *ab initio* and place GET in contempt of the French court (not least because the French court was concerned to ensure that GET could not make a speculative sale to the detriment of the creditors);
  - (ii) Similarly, a long-term charter of the Vessels would not be permitted; and
  - (iii) The French court has effectively tied the operation of the Vessels by the SCOP as an integral part of the judgment.
- 3.15 Furthermore, the application of French employment laws<sup>4</sup> also means that, irrespective of the control of the French court, any new acquirer of the Vessels would be obliged to take on the SCOP employees to operate those Vessels.
- 3.16 These are all factors which the CC must consider when assessing whether a divestment remedy is practical or capable of effective implementation.

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<sup>4</sup> Article 1224-1 of the Code du Travail.

#### 4. CC's Divestiture Remedy

4.1 We note that the CC is inviting views both on the effectiveness of its proposed remedy to enforce divestiture of the MyFerryLink business and on whether there are any alternative practicable remedies.

4.2 The CC's Remedies Guidelines<sup>5</sup> set out the CC's obligations under the Enterprise Act 2002 when considering remedial action. In short, the CC must assess the reasonableness and effectiveness of remedies in addressing the SLC and consider the costs likely to be incurred<sup>6</sup>. Ordinarily, the CC favours structural remedies, such as the one proposed in the Remedies Notice, as these "*re-establish the structure of the market*"<sup>7</sup>. However, in this case, SCOP has some concerns that such a simple divestiture remedy may not be reasonable, effective, practicable or capable of effective implementation for a number of reasons.

*The divestiture remedy is incompatible with the order of the French court*

4.3 The order of the French Tribunal de Commerce in June 2012 is very clear. GET cannot sell or otherwise dispose of the Vessels for a period of 5 years. Furthermore, as discussed above, the SCOP workers are inextricably linked to the decision to grant a sale to GET and hence there is no prospect of disposal of the Vessels in a manner which does not guarantee their continued operation by the SCOP.

4.4 There are additional complexities which the CC must consider concerning commitments given to the French court to operate the Vessels under the French flag, failing which various fiscal implications arise. These include the potential for [§<] to be added to the liabilities of SeaFrance in liquidation.

4.5 The CC's Remedies Guidelines state that "*in order to be reasonable and proportionate the CC will seek to select the least costly remedy or package of remedies, that it considers will be effective*"<sup>8</sup>. These are clearly significant costs, in addition to the human and financial costs facing the SCOP should the CC proceed with a divestment order incompatible with the French court order (see above). The CC must bear these costs in mind when assessing whether such a divestiture remedy is reasonable and proportionate.

4.6 [§<].

*The divestiture remedy is incompatible with customer benefits*

4.7 The CC's guidelines state that when considering remedies, the CC may have regard to relevant customer benefits<sup>9</sup>. These include:

- (i) Lower prices;
- (ii) Higher quality or greater choice; and
- (iii) Greater innovation.

4.8 In contrast to the increase in competition and choice clearly arising from the launch of MFL, the CC's divestiture remedy will inevitably lead to a reduction of choice. Further, given the

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<sup>5</sup> Merger Remedies, Competition Commission Guidelines, CC8.

<sup>6</sup> *Ibid*, paragraphs 1.7 and 1.8.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*, paragraph 1.9.

<sup>9</sup> *Ibid*, paragraph 1.14.

inevitable, forced, reduction in capacity and choice that would result from a divestiture remedy, the SCOP considers it highly likely that the divestiture remedy will itself inevitably give rise to **higher prices**.

- 4.9 Furthermore, as is clear both from MFL's own interaction with customers and from the CC's own survey and hearings with customer groups, customers welcome both the additional choice and the increased frequency of crossings that have resulted from the launch of MFL. This is evidenced by the significant growth in freight traffic that MFL has shown so far in 2013 (see above).

*The divestiture remedy is contrary to the principles of cooperation between NCAs*

- 4.10 The SCOP is concerned that the divestiture remedy would not only be disproportionate and unreasonable, but also runs contrary to the principles of cooperation between national competition authorities enshrined in the European Commission's Best Practice Guidelines<sup>10</sup>.
- 4.11 The present transaction is an unusual case given that the relevant markets assessed by each of the French and UK competition authorities are exactly the same. Hence especial care must be taken by either authority when considering remedies to address potential concerns, given that any such remedies will impact on consumers on both sides of the Channel.
- 4.12 The CC's Provisional Findings are entirely at odds with the decision of the FCA, adopting a counterfactual explicitly rejected by the FCA. Furthermore, the Provisional Findings do not take into consideration the effect both of the undertakings already given to the FCA, but also of the practical implications, including the fact that concerns around the difficulty of monitoring compliance are readily addressed by the existence of a pre-existing monitoring trustee under the terms of the FCA decision.

## 5. **Alternative remedies**

- 5.1 At its hearing with the SCOP on 28 February 2013, the CC invited the SCOP to consider any alternative structural remedies that SCOP considered might be practicable and effective.
- 5.2 The CC also asked for SCOP's views on whether SCOP could continue its present operations if the remedy resulted in a third party operator effectively 'stepping into GET's shoes'. SCOP understood this suggestion to involve the following elements:
- (i) GET would continue to own the ships and to charter them to SCOP under the terms of the existing contractual arrangements;
  - (ii) SCOP would continue to operate the ships under the terms of its existing contract with MFL SAS; and
  - (iii) An independent third party would take over those commercial aspects of the operation currently performed by or on behalf of MFL SAS.
- 5.3 In order to be effective and practicable, any such proposal must include at least the following safeguards to protect SCOP's interests:
- (i) Assurances that the SCOP's rights and benefits under its agreement with MFL SAS would be protected; and

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<sup>10</sup> Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 8 November, 2011.

(ii) A longer-term commitment from the new operator to work with SCOP. [X].

5.4 The SCOP would also like the CC to give consideration to other possible remedies aimed at addressing the alleged adverse effects identified by the CC by ensuring the complete separation of the GET Shuttle service from the MFL ferry business.

*Independence of SCOP*

5.5 As set out above, the SCOP is an independent entity with no structural or managerial links with GET. There exists a contractual arrangement between the two entities (via the contract with MFL SAS).

5.6 Consequently, whilst SCOP operates the vessels and undertakes certain commercial activities on behalf of MFL SAS, [X].

*Package of contractual and behavioural remedies*

5.7 A solution consistent with the Remedies Notice and the decision of the French court could however be achieved through a remedy which extended SCOP's existing commercial agreement with GET and which would allow SCOP to make an offer to acquire the Vessels on expiry or to renew the agreement.

5.8 This would not of itself deal with the concerns expressed by the CC concerning the control of GET (through MFL SAS) of the core commercial activities of passenger and freight sales in the short-term.

5.9 As the CC is aware, GET's only link to the MFL business arises via the bareboat charter arrangements and the commercial agreement between MFL SAS and the SCOP. Under these arrangements, MFL SAS purchased [X] crossings in the first year of operation. MFL SAS then sells passenger and freight services on these crossings.

5.10 As a matter of practice, passenger sales are handled by DCF for MFL SAS and MFL SAS sells freight using its own freight commercial team. There is total separation between the commercial activities of GET's Shuttle services and MFL SAS' operations, reinforced by the undertakings given to the FCA.

5.11 To reinforce this position, all MFL commercial staff and commercial management (including those currently working within MFL SAS) could transfer to the SCOP.

5.12 This remedy would be effective in addressing the CC's concerns around horizontal unilateral effects. In addition, it would be practicable since it would not breach the obligations to the French court and hence capable of effective implementation. In addition, the CC could achieve its objectives of ensuring functional separation of the MFL business by reinforcing the behavioural commitments that have already been accepted by the FCA.

5.13 In addition to the pricing commitments offered, GET has committed to ensuring that a separate commercial team is responsible for MFL's commercial operations to that responsible for GET's Shuttle services through the tunnel, ensuring that the two teams operate autonomously and independently of each other. These commitments are already monitored and enforced by a monitoring trustee, who reports back on compliance to the FCA.

5.14 SCOP consider that when assessing concerns around the cost and difficulties of monitoring compliance of such a remedy, the CC must have regard to GET's obligations to the FCA and the ongoing monitoring undertaken by the FCA. SCOP considers that it would be relatively straightforward both to extend and reinforce as necessary these behavioural

commitments, for example by imposing an obligation on the existing monitoring trustee to report both to the OFT (in respect of UK compliance) and the FCA (in respect of French compliance).

- 5.15 Such a solution would respect the principles of cooperation between National Competitions Authorities, whilst addressing the perceived harm identified by the CC in the UK. In the unusual circumstances of this case, SCOP therefore considers that such a behavioural remedy would be effective, reasonable, practicable and capable of effective implementation and would therefore address the SLC and its perceived adverse effects.
- 5.16 The SCOP appreciated the opportunity to meet with the CC on 28 February and would like to reiterate its offer to meet further with the CC, as appropriate, to explore possible remedies along the lines identified above.