



Competition Commission Investigation

Eurotunnel's acquisition of assets from the liquidator of Sea France

Response to CC Provisional Findings

1. **Executive Summary**

- 1.1 This Response provides the SCOP's preliminary views on the CC's Provisional Findings; the SCOP has responded separately to the CC's Notice on possible remedies.
- 1.2 In short, the SCOP does not agree with the conclusions reached by the CC in the provisional findings.
- 1.3 First, the SCOP does not agree with the CC's conclusions that the transaction is a relevant merger situation for the purposes of section 35 of the Enterprise Act, because acquisition of the Vessels in the circumstances of this case does not constitute acquisition of an 'enterprise'.
- 1.4 Second, the SCOP has concerns about the CC's conclusions on the counterfactual. In its response to the Remedies Notice, the SCOP has already raised concerns about the incompatibility of the CC's conclusions both with regard to the decision of the French Competition Authority ("FCA") and, more fundamentally, with the order of the French Tribunal de Commerce. The SCOP also considers the conclusion on the exiting firm scenario to be extraordinary in the circumstances.
- 1.5 Third, the SCOP considers that the CC's conclusions are not supported by the evidence and/or that material facts have not been adequately assessed.
- 1.6 The launch of the MyFerryLink business ("MFL") has been clearly pro-competitive, resulting in an increase in the number of ferry operators from 2 to 3, with a consequent increase in choice to the benefit of passenger and freight customers across the short sea.
- 1.7 In addition, the SCOP does not accept the CC's conclusion on capacity or that DFDS will, as a consequence of the transaction, inevitably exit the Dover-Calais route (let alone the relevant short sea market). There is simply no evidence to support this conclusion. Nor does the SCOP accept the CC's conclusions that DFDS is a "*relatively weak competitor*"¹ which is unsupported both by evidence of its strong growth over the course of the past 12 months and by the evidence of DFDS itself, which has publicly reiterated its intention to remain as a strong competitor across the short sea, including, specifically, Dover-Calais.
- 1.8 For these reasons, contrary to the CC's provisional findings, there can be no substantial lessening of competition ("SLC") in the UK as a consequence of the transaction.
- 1.9 In the remainder of this paper the SCOP makes submissions on the following topics from the Provisional Findings:
 - The relevant merger situation (section 2).
 - The counterfactual (section 3).
 - Competitive effects – capacity and likelihood of exit (section 4).

¹ CC Provisional Findings, paragraph 8.84.

2. The relevant merger situation

2.1 The Enterprise Act 2002 defines an 'enterprise' as *'the activities, or part of the activities, of a business'*². In its Merger Assessment Guidelines, the CC states that it *"will have regard to the substance of the arrangement under consideration, rather than merely its legal form"*³.

2.2 With respect, the SCOP considers that the only valid conclusion of any assessment of the substance of the arrangements at issue, is that the arrangements do not meet the legal test of being an 'enterprise' and hence that no relevant merger situation has been created.

2.3 The SCOP comments below on the following points:

- There is no evidence that MFL benefits from any goodwill attributable to SeaFrance. In fact, quite the reverse is true;
- The Vessels themselves were not in a position to resume sailings immediately, resulting in a further delay and the loss of the majority of the crucial English school holiday season;
- GET does not have material influence over the SCOP; and
- Any association within the meaning of section 127 of the Enterprise Act 2002 is in any event irrelevant (as the assets acquired by GET do not constitute an enterprise).

MFL is a start-up business

2.4 At the outset of commercial operations in August, MFL's ships travelled essentially empty. For example, a Nord Littoral article reported that only five vehicles left the Rodin upon its arrival in Dover and that the author of the article was then the *"only passenger on board the ferry"* on the return to Calais *"while the queue stretched in the loading lines of DFDS Seaways and P&O"*⁴.

2.5 Just before it ceased operations in November 2011, SeaFrance had a market share of around 11% for passengers⁵ and 16% for freight⁶. There was a considerable gap of fully nine months between the exit of SeaFrance and the launch of MFL. Failure to commence services in time for the English summer school holidays effectively meant that 100% of these customers were lost to competitors. [X].

2.6 As a result, MFL's present freight market share is only around [X]% at the end of January 2013 (see Table 1 below). These figures are entirely consistent with the launch of a new service. They do not provide any support for the CC's conclusions that the statutory test of acquiring the 'activities of a business' are met.

The Vessels had deteriorated

2.7 Further, the CC states that it will make its assessment of a business transfer *"by reference to the assets actually transferred at the date of acquisition and will therefore take into account factors such as deterioration in the physical state of the vessels"*⁷. The CC itself

² Section 129 (1) of the Enterprise Act 2002.

³ OFT and CC Joint Merger Assessment Guidelines, paragraph 3.2.3.

⁴ Nord Littoral article entitled *"La (re) naissance de My Ferry Link"*, published 21 August 2012 (Annex 1).

⁵ Table 2 of Annex 1 of Appendix C to the Provisional Findings (PAX).

⁶ Table 2 of Annex 2 of Appendix C to the Provisional Findings (Freight).

⁷ Provisional Findings, paragraph 4.11.

notes that the Vessels were not "operations-ready"⁸, that they required flash-docking and re-certification before they could be used for commercial operations.

2.8 At the outset, the SCOP did not benefit from pre-existing certification. This meant that the SCOP had to apply for new navigation certificates. In fact, prior to the launch of MFL on 20 August, the SCOP had to apply for limited certificates to enable the Vessels to be moved to Dunkirk for flash docking (together with the minimum crew required for that activity). Subsequently, the SCOP was only able to obtain provisional certificates valid for the 6 months to February 2013 for the *Berlioz* and only to November 2012 for the *Rodin* (see Annex 2 for the single voyage and initial temporary certificates for each of the *Berlioz* and the *Rodin*). Following an audit in February, the SCOP now has five year certificates for the Vessels.

2.9 In addition, given that no employees transferred automatically with the Vessels, the SCOP had to undergo an external recruitment drive to ensure that it had sufficient numbers of experienced staff to operate the ships. In fact, the SCOP only had sufficient personnel to launch two ships just prior to the launch of services towards the end of August 2012. As of [REDACTED], the SCOP has sufficient personnel to operate all three of its ships at full capacity.

SCOP is independent of GET and GET does not have material influence over SCOP

2.10 The SCOP is an independent entity from GET, tied only by the terms of the [REDACTED] bareboat charter and a commercial operation agreement entered into with MFL SAS⁹. This is the full extent of the SCOP's relationship with GET and MFL SAS.

2.11 The CC appears not to have fully appreciated the relationship between GET and MFL SAS and GET (and MFL SAS) and the SCOP – the only links between GET and the SCOP are those set out in the commercial agreement which governs how SCOP operates the Vessels for GET and the arrangements under which MFL SAS acquires crossings at an agreed rate from the SCOP.

2.12 GET does not have material influence over the SCOP. The SCOP acknowledges that GET was a key driver behind the establishment of the MFL operations. However, the question for the CC to address is whether GET has material influence over the SCOP once the operations are underway¹⁰. For the reasons set out below, it is clear that it does not.

2.13 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. GET has no strategic veto rights over any decisions of the SCOP. GET has no control over the pricing activities of the SCOP (as distinct from MFL) over and above the provisions set out in the commercial agreement.

2.14 Whilst the SCOP accepts that [REDACTED] essential to the success of the project, this is not an indicator of material influence. The SCOP also considers that the nature of the corporate structure governing the operation of the Vessels and the operation of the undertakings given to the FCA prevents GET from exercising material influence over the SCOP.

⁸ Provisional Findings, paragraph 4.18(c).

⁹ Further details regarding the SCOP are provided at Section 3 of our response to the CC's Notice on possible remedies.

¹⁰ OFT decision in Project Canvas, paragraph 33.

SCOP and GET are not associated persons

- 2.15 The SCOP does not accept the CC's provisional conclusion that it and GET are associated persons¹¹.
- 2.16 Section 127(4)(d) of the Enterprise Act provides that "*two or more persons acting together to secure or exercise control of a body of persons corporate or unincorporate or to secure control of any enterprise or assets shall be regarded as associated with one another*". The OFT's guidance, discussing this concept states that "*this situation will most commonly arise where the acquiring persons are related or have a signed agreement to act jointly to make an acquisition*"¹².
- 2.17 The SCOP and GET are neither related nor have they signed any agreement to act jointly to make an acquisition. Rather, the 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. Neither of these agreements, either in isolation or in tandem, constitute an agreement to act jointly to make an acquisition.
- 2.18 The CC has also itself previously considered the concept of associated persons and found that "*Section [127] (which is concerned only with establishing jurisdiction) is clearly based on the proposition that persons such as a husband and wife, or a trustee and settlor, are persons who commonly do not act independently of each other and hence can reasonably be expected to coordinate their behaviour*"¹³.
- 2.19 There is no evidence to suggest that GET and SCOP have any intention, or motive, to coordinate their behaviour. The SCOP is motivated entirely by its ambition to operate the Vessels, for the mutual benefit of its shareholders (by creating significant employment opportunities) and delivering excellent customer service. Indeed, the SCOP's unique structure means that each of its employees is directly incentivised to ensure its success.
- 2.20 The OFT has in the past held that the mere fact that joint venture parties are parties to a start-up does not, in itself, make them associated persons¹⁴. GET and the SCOP have not acted together to secure or exercise control over an existing body corporate or to secure control of any existing enterprise or assets. Rather, they have come together only by virtue of the contractual arrangements discussed above to enable the SCOP to crew and operate the Vessels. Indeed, rather than coming together to effect a joint bid, SCOP's agreement with GET to operate the Vessels [§<].
- 2.21 Consequently, SCOP does not consider that it and GET should be considered associated persons for the purposes of section 127. In any event, SCOP does not consider any such conclusion to be relevant to the question of whether GET has, as a matter of fact, acquired an 'enterprise' for the purposes of the Enterprise Act.

The SCOP cannot be considered to be part of the assets acquired

- 2.22 For the reasons given above, the SCOP does not consider either that GET has material influence over the SCOP or that the SCOP and GET are associated persons for the

¹¹ Provisional Findings, paragraph 4.31.

¹² OFT Jurisdictional and Procedural Guidance, paragraph 3.43.

¹³ Competition Commission: Icopal Holding A/S and Icopal a/s A report on the merger situation (2001), paragraph 2.36. The OFT, in its Project Canvas decision given in May 2010, stated at footnote 45 that the CC Icopal Report "*referred to section 77 Fair Trading Act 1973, but the reasoning is applicable also to section 127 of the [Enterprise] Act*".

¹⁴ OFT decision in Project Canvas, paragraph 42.

purposes of section 127 of the Enterprise Act. Further, and in any event, the SCOP does not accept the CC's conclusion that "*the ex-SeaFrance employees recruited by the SCOP are part of the bundle of assets the CC must consider when applying the 'enterprise' test*"¹⁵.

2.23 It does not follow that a conclusion of association under section 127 permits the CC to conclude that all assets of both parties form part of the bundle of assets acquired and hence inform the decision on whether an 'enterprise' has been acquired.

2.24 Rather, section 127 is intended to enable the authorities to consider the nature of the entity acquiring control. This is relevant to any substantive assessment for example because it goes to the nature and position on the market of the acquiring entity. It is not, however, relevant for the purpose of deciding whether the entities, whether associated or not, have acquired an enterprise.

3. The counterfactual

3.1 The CC addressed three approaches to the counterfactual that it considered might have been available to the French court, namely:

- Approach 1: the Court abandoned the sealed bid process and held a public auction;
- Approach 2: the Court considered only the initial sealed bids; and
- Approach 3: the Court considered DFDS' revised bid.

3.2 The CC provisionally concluded that "*under each approach DFDS/LD would have been likely to have acquired the Berlioz and may also have acquired the Rodin, and that the appropriate counterfactual is that DFDS/LD would have operated two vessels on the Dover-Calais route in conjunction with three on the Dover-Dunkirk route*"¹⁶.

3.3 This conclusion fails to take account of the explicit rejection by the French court of any attempt by DFDS to improve its offer after the opening of the sealed bids in court. It also fails to consider the reality of the sealed bids themselves.

3.4 For example, the court record states that a combination of the offers by Stena for the *Rodin* and DFDS for the *Berlioz* delivered a higher value for those ships, but that "*La proposition du groupe EUROTUNNEL est la seule qui permet d'apprécier les conditions futures d'exploitation notamment au regard du pavillon français*"¹⁷.

3.5 In other words, absent GET's bid, the most likely scenario would have been the exit of the *Nord-Pas-de-Calais* from the relevant market (for which no separate bids were received), the acquisition by Stena of the *Rodin* and therefore its exit from the relevant market¹⁸ and the acquisition of the *Berlioz* by DFDS (who would almost certainly simply have used this ship in place of (but not in addition to) one of its other current ships (most likely the *Molière*).

3.6 The SCOP therefore considers that the conditions of the exiting firm scenario are satisfied, namely:

¹⁵ Provisional Findings, paragraph 4.32.

¹⁶ Provisional Findings, paragraph 5.27.

¹⁷ Court extract of 29 May 2012 (Annex 3). The document goes on to discuss the commitments by GET to ensure the ships are operated by the SCOP.

¹⁸ As the CC noted at paragraph 5.17 of its Provisional Findings "*Stena RoRo told us that it did not have any plans to operate the Rodin itself and did not have any plans to enter the short sea market, and had its bid been successful, it would have either sold the Rodin on the open market or sought to charter it to another ferry operator around the world*".

- SeaFrance had already exited the market. It ceased trading in November 2011 and had its assets sold through a liquidation process;
- There was no less anti-competitive alternative purchaser. The most likely counterfactual would have resulted in the exit from the relevant market of at least two of the three ships, a reduction in choice and the number of ferry operators on the short sea, reduced service levels (given a reduced frequency of overall sailings) and a likely increase in prices (given the reduction in competition and capacity); and
- Given the significant lag in time between the exit of SeaFrance and the commencement of operations by MFL, there were no sales of the exiting firm for the purposes of this limb.

3.7 Given the nature of the assets acquired, the absence of any goodwill transferred, the significant gap between the cessation of SeaFrance's commercial activities in November 2011 and the commencement of MFL's services nine months later in August 2012, the absence of any transfer of employees and the fact that the assets were acquired from a liquidator through a court-run process following the liquidation of SeaFrance, the SCOP considers it extraordinary that the UK authorities have concluded that the conditions for application of the exiting firm defence are not met.

4. **Competitive effects – capacity and likelihood of exit**

4.1 The CC's provisional finding of an SLC is predicated on the following, cumulative, hypotheses:

- There is significant over-capacity on short sea routes in the short to medium term¹⁹; and
- As a result, one operator will inevitably exit²⁰; and
- As a result, DFDS will cease operating services between Calais and Dover²¹; and
- MFL will reach its target market share and that consequently "*GET's position in the relevant markets would strengthen significantly*"²². In other words, the CC is also assuming that there will be no reduction in GET's existing market share as a result of any increase in share by MFL.

4.2 As a result of the above hypotheses, the CC concludes that GET is likely to raise prices on its Eurotunnel shuttle services (due to its ability to internalise some of those losses which would convert to MFL).

4.3 The SCOP submits that it is therefore clear that in order for the CC to reach a valid finding of an SLC on this basis, the CC must be convinced, applying the 'balance of probabilities' test, that all of the above hypothetical conclusions are supported by facts, likely to hold true and that all material factual considerations have been taken into account.

¹⁹ Provisional Findings, paragraph 9.2.

²⁰ *Ibid.*

²¹ Provisional Findings, paragraph 8.74.

²² Provisional Findings, paragraph 8.77(a).

4.4 Yet this is plainly not the case:

- Recent evidence from the Calais Chambre de Commerce project strong growth (over 11% for passengers and 18% for freight) in 2013 as the market moves back towards 2011 volumes;
- There is no evidence that DFDS would contemplate an exit from Dover-Calais. Indeed, in an interview as recently as 1 March 2013, Jean-Claude Charlo, Finance Director of DFDS stated that its share of freight had multiplied by six, that it was increasing its share despite the launch of MyFerryLink, that the arrival of the former SeaFrance vessel *Molière* "répond pleinement à nos accords" that DFDS had taken a long-term decision to remain on the route and that "Si quelqu'un doit quitter le détroit, ce n'est sûrement pas nous"²³;
- The CC themselves state that, even on its assumptions, it is not likely that DFDS would exit the Dover-Dunkirk route and hence they will continue to compete on the relevant short sea market;
- There is no recognition of the fact that P&O have announced a reduction in capacity from seven vessels before the exit of SeaFrance to six vessels and subsequently to five. Further, given that both DFDS and P&O operate a broader European network of routes, there is no consideration of the ease with which both P&O and DFDS can redeploy ships across their network (enabling them to increase and reduce capacity with relative ease); and
- There is no evidence to support the CC's assumptions that the correct market share to attribute to MFL is its target market share and that GET's market share through the tunnel would not decline as a result of the increased competition across the short sea. [X].

4.5 The danger inherent in the CC's analysis is clear. If any of its assumptions do not hold true, the foundation of the CC's economic case for an SLC itself will be flawed. Further, the SCOP is mystified that even on its own analysis the CC has recognised that the transaction will result in three independent players competing across the short sea (MFL, DFDS and P&O), yet the only outcome of the CC's present finding of an SLC and proposed divestiture remedy will be a **reduction** to two players (DFDS and P&O)²⁴.

Excess Capacity

4.6 The SCOP considers that the pertinent question is not the extent of excess capacity on the Dover-Calais route today, but rather, whether there is sufficient capacity to meet customer needs within the short to medium term and sufficient traffic to sustain existing levels of competition over the same period. The CC itself acknowledges that "in order to deliver an acceptable standard of quality it is necessary to retain some spare capacity"²⁵.

²³ Interview with Jean-Claude Charlo, Finance Director of Louis Dreyfus Transmanche Ferries, in *Article Le Nord Littoral*, dated 1 March 2013. A copy of this article is attached at Annex 4.

²⁴ In either case, GET would additionally continue to offer services through the tunnel.

²⁵ Provisional Findings, paragraph 8.33.

- 4.7 The CC projected that the market will grow by only 2-3%²⁶. Yet estimates of the Port of Calais in November 2012²⁷ projected significantly greater growth for both passengers and freight on the Dover-Calais route:
- The passenger market will grow by 11.5%, up from 9.4 million to 10.5 million; and
 - The freight market will grow by 18.4%, up from 31.6 million to 37.4 million.
- 4.8 In addition, the CC must consider actual capacity statements by other operators, including P&O. Contrary to the assertion of an "increase in the level of capacity operated by P&O"²⁸ owing to the launch of the *Spirit of France*, the SCOP understands that P&O is in the process of implementing a restructuring of its business which will involve the reduction of its vessels on the Dover-Calais route from six to five. Indeed, P&O originally operated seven ships between Dover and Calais.
- 4.9 This position was confirmed by P&O in an article in the *Dossier Transmanche* when P&O states that "*P&O Ferries est persuadé que sa flotte de cinq navires lui permet d'offrir une prestation compétitive tan face aux autres opérateurs de ferries qu'au Tunnel, surtout sur le marché du fret*"²⁹. The SCOP also understands that P&O have decreased the number of slots they hold in Calais from six to five. This reduction in its capacity and operating frequency is also clearly shown in the January 2013 market share estimates (see Table 1 below) which shows a reduction of nearly 10% in the freight volumes carried by P&O in January 2013 compared to January 2012.
- 4.10 Hence even if the CC continues to believe, on the balance of probabilities, that "*the current level of competition on the short sea is unsustainable and... we expect there will be a rationalization of capacity on the Dover-Calais route in the short to medium term*", the CC must factor in the announced reduction in capacity by P&O. The SCOP therefore urges the CC to seek urgent clarification on these points from P&O.
- 4.11 Finally, the SCOP notes that choice of operator and frequency of services are factors that are clearly important to customers³⁰. [X].

No exit of DFDS

- 4.12 There is no evidence to support the conclusion that DFDS is likely to exit Dover-Calais in the short to medium term. At paragraph 8.75 of the Provisional Findings, the CC states that DFDS' share is around 4% of freight. This is not supported by the evidence.

Table 1: Total Freight (Short Sea Routes)

	Units (Jan 2012)	Market share (%)	Units (Jan 2013)	Market share (%)	Increase (%)
P&O	102,320	37.3	92,951	32.7	-4.6
MFL	-	-	11,764	4.1	+4.1
DFDS	53,940	19.7	66,117	23.3	+3.6

²⁶ Provisional Findings, paragraph 8.36.

²⁷ See Annex 5.

²⁸ Provisional Findings, paragraph 7.13(b).

²⁹ P&O Ferries bénéficie de l'effet "spirit", Annex 6.

³⁰ See, for example, the hearing summaries of Customers A, B, C, D and E, as produced by the CC.

Eurotunnel	117,762	43	113,247	39.9	-3.1
Total (Short sea)	274,022	100	284,079	100	-

Source: IRN Research, Ferrystat, January 2013

- 4.13 DFDS is the largest shipping company in Europe, operating across 10 routes, including the short sea, with a turnover nearly twice as large even of GET. It has achieved considerable growth on the short sea routes, including on Dover-Calais, at the expense of both P&O and Euotunnel. As is clear from Table 1 above, DFDS now accounts for more than 23% of freight across the short sea, of which nearly 10% is on Dover-Calais.
- 4.14 DFDS is categorically not a "relatively weak competitor"³¹. In its evidence to the CC, P&O also recognise the strength of DFDS: "*P&O identified DFDS on Dover-Dunkirk route as a medium to strong competitor, and DFDS on Dover-Calais route as a medium competitor. P&O emphasized that looking at the combined DFDS operations, it reached a scale similar to P&O and therefore the combined operation must be seen as a very strong competitor*"³².
- 4.15 DFDS has stated publicly in its Annual Report that it wishes to run a European ferry network, has a growth strategy and that one of its strategic priorities is to operate on the Dover-Calais route³³. There is simply no evidence to substantiate the CC's conclusions that DFDS is a weak competitor or that "*it would [not] be rational for DFDS to hold out for a long time in the hope of an MFL exit*"³⁴. On the contrary, in a recent press article, DFDS has stated "*Si quelqu'un doit quitter le détroit, ce n'est sûrement pas nous*"³⁵. Having launched DFDS Seaways France, a venture which absorbed all the previous routes of LD Lines, there is clear confirmation and evidence that DFDS has no intention of ceasing to compete on the short sea.
- 4.16 The CC should also be aware that DFDS derives significant benefits from its operations on the Newhaven-Dieppe route (which forms part of the relevant market found by the CC³⁶). Notably, this route benefits from a subsidy of nearly €14m plus €3,000 per crossing to DFDS in respect of fuel subsidies. These are not insignificant subsidies and must be borne in mind when considering DFDS' appetite and ability to subsidise loss-making routes elsewhere in its network (including Dover-Calais).

GET's overall position will not strengthen significantly as a result of the merger

- 4.17 The CC's conclusions that the transaction will give rise to an SLC is predicated on the following cumulative assumptions:
- Over capacity (see above);
 - Inevitable exit of DFDS (see above); and
 - Significant strengthening of GET's overall market share³⁷.
- 4.18 To be merger specific, this latter point requires not only for MFL to reach its target market share in the short to medium term, but also for GET to retain its Eurotunnel market share.

³¹ Provisional Findings, paragraph 8.84.

³² Provisional Findings, paragraph 7.22.

³³ A copy of DFDS' Annual Report can be found here: <http://www.dfdsgroup.com/investors/reports/>

³⁴ Provisional Findings, paragraph 8.62.

³⁵ Attached at Annex 1.

³⁶ Provisional Findings, paragraph 6.37.

³⁷ Provisional Findings, paragraph 8.77.

In other words, the CC's conclusions only hold true if the overall GET position (Eurotunnel plus MFL) increase significantly.

- 4.19 Again, this is simply not supported by the evidence. As is clear from Table 1 above, GET's net position is largely unchanged when comparing January 2013 against January 2012 (i.e. MFL's share of 4% must be considered in the context of a reduction in the volume of freight carried by Eurotunnel of 3%).

Conclusion on competitive effects

- 4.20 It follows from the above that the SCOP considers the CC's fundamental hypotheses which underpin its provisional finding of an SLC to be flawed and not supported by the evidence and/or that material facts have not been adequately assessed.