



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

Response from SCOP to CC Supplementary Notice of Possible Remedies

1. Executive Summary

- 1.1 This response provides the SCOP's preliminary views on the Competition Commission's ("CC") Supplementary notice of possible remedies (the "Supplementary Notice"). The SCOP has responded separately to the CC in respect of the CC's Initial Remedies Notice.
- 1.2 The SCOP wishes to state at the outset that it continues fundamentally to disagree with the conclusions reached by the CC in the Provisional Findings. As was made clear in the SCOP's response to the Provisional Findings, the launch of the MyFerryLink business ("MFL") has been clearly pro-competitive, resulting in an increase in the number of ferry operators on the short sea from 2 to 3, with consequent benefits to customers from increased choice, service and competition as a result.
- 1.3 In contrast, in its Initial Remedies Notice of 19 February, the CC appeared to be focussing solely on solutions designed to reduce capacity and choice. In other words, and somewhat counter-intuitively, in response to a merger which has led to new entry, increased capacity and increased choice, the favoured regulatory solution appeared to be a forced and imminent reduction in capacity and reduction in choice. Ordinarily, such a solution would be expected to lead to higher prices and a worse outcome for consumers.
- 1.4 The SCOP continues to believe that no remedy is required, or that far less intrusive remedies would address any concerns which might arise as a result of the highly hypothetical conclusions reached by the CC. Indeed, the SCOP considers that behavioural remedies along the lines adopted by the French Competition Authority and/or the continuation or strengthening of the interim undertakings should not be excluded in the particular circumstances of this case (including the need for consistency of approach in cross-border mergers).
- 1.5 However, without prejudice to these views and the SCOP's response to the Provisional Findings more generally, the SCOP is pleased to have the opportunity to comment on the alternative remedies set out in the Supplementary Notice.
- 1.6 In summary:
 - Any remedy which has the effect of removing the Vessels and/or the SCOP from the short sea would be incompatible with the Order of the French Tribunal de Commerce. This encompasses both divestiture and long-term charter remedies in advance of expiry of the Inalienability Clause in 2017.
 - A divestiture remedy imposed now to apply after expiry of the Inalienability Clause would be highly speculative and incapable of adaptation to actual market evolution without the ability to review the market situation at the relevant time.
 - The competition authorities have the power to review markets that may not be operating efficiently and which may be giving rise to an adverse effect on competition through the market investigation powers in the Enterprise Act 2002. In the present context, given both the uncertainties concerning the CC's own predictive analysis and the obligations due to the French Tribunal de Commerce, the most

appropriate outcome would be a commitment to review the market position in 2015, allowing for a final resolution, if necessary, around the time of expiry of the Inalienability Clause.

- In the meantime, additional behavioural remedies along the lines previously proposed by the SCOP and a commitment to extend the existing contractual arrangements with the SCOP until 2017, will suffice to ensure that the market develops free of distortions. Price control remedies would be disproportionate, expensive to monitor and likely to result in distortions to the market that would impact on the ability of the authorities to conduct a successful market investigation.

2. Background

- 2.1 At paragraph 5 of the Supplementary Notice, the CC sets out the statutory test at section 35(4) of the Enterprise Act 2002 and the CC's Guidelines on remedies¹, namely that a solution must be as comprehensive as is reasonable and practicable and that the CC will have regard to the principle of proportionality when deciding on whether and if so which remedies should apply. The CC must also ensure that no remedy is disproportionate to the SLC and its adverse effects. The SCOP considers that a number of the proposals set out in the Supplementary Notice do not meet these criteria and expands on these below.
- 2.2 At paragraph 10 of the Supplementary Notice, the CC states that it will "*take into account the implications of GET's arrangements with the SCOP to operate the Vessels in assessing whether the effect of the [French Court] Order, including the Inalienability Clause, is to prohibit only the sale of the Vessels or whether it also prevents GET from chartering the Vessels to another provider and whether its effect is to impose a requirement on GET to operate the Vessels for five years*".
- 2.3 The SCOP has already commented on the incompatibility of any divestiture remedy with the order of the French Tribunal de Commerce in its Response to the Initial Remedies Notice. At this stage, the SCOP wishes to reiterate its view (as recognised by the CC) that divestiture or long-term structural remedies are incompatible with the Order, absent prior approval of the French court. The SCOP also agrees with the CC that approval of the French court is highly unlikely without sufficient safeguards concerning the long-term employment prospects of the SCOP.
- 2.4 The SCOP would also like to reiterate its view² that any divestiture remedy is therefore impracticable and incapable of successful implementation. In other words, such a remedy meets neither the statutory test nor the CC's own Guidelines, including in respect of the principle of proportionality.

3. Part A: Divestiture remedies which are likely to require Court approval

- 3.1 The SCOP agrees with the CC that divestiture remedies prior to expiry of the Inalienability Clause will require prior approval of the French court and that such approval is likely to require at least identification of a suitable purchaser up-front and commitments to secure the employment prospects of the SCOP (as set out at paragraph 17 of the Supplementary Notice).
- 3.2 For the reasons set out above and in SCOP's earlier submissions to the CC, the SCOP considers that this renders any such divestiture remedy impracticable and incapable of effective implementation. In addition, the SCOP is surprised by the CC's assertion that it has "*received no evidence to suggest that the consequences of changing the flag of the*

¹ *Merger Remedies: Competition Commission Guidelines, CC8, November 2008.*

² See the SCOP's Initial Response to CC Notice of possible remedies.

Vessels remain an issue"³. In fact, quite the reverse is true – the Order makes explicit reference to the severe financial consequences of a future change in flag to the creditors of SeaFrance: "*La proposition du Groupe EUROTUNNEL est la seule qui permet d'apprécier **les conditions futures** d'exploitation notamment au regard du pavillon français. En effet les autres pollicitants n'ont pas précisé les conditions de pavillon tout en indiquant que les navires seraient affectés sur d'autres liaisons que la liaison d'origine. Or le changement de pavillon est susceptible de générer un passif fiscal lié aux conditions d'acquisition du navire de l'ordre de 35 millions d'euros, à la charge de la liquidation judiciaire*" (emphasis added).

3.3 It is simply not plausible that a transaction giving rise to a tax liability in the region of €35m, in the context of a liquidation process, would not constitute a "*transaction spéculative au détriment des créanciers*"⁴.

3.4 The precise terms and rationale of the French Tribunal de Commerce order are clear, including both GET's commitments to create significant employment prospects in the Nord-Pas-de-Calais region and its commitments concerning the retention of the French flag:

- "**Disons** que les navires, eu égard à la faiblesse du prix et aux conséquences financières d'un changement éventuel de pavillon et afin d'éviter toute transaction spéculative au détriment des créanciers seront déclarés inaliénables pour une durée de cinq ans, au sens de l'article L.642-10 du Code de Commerce".
- "**Disons** au regard des engagements pris en matière sociale du reprenneur et en l'absence de garantie de bonne exécution que le Groupe EUROTUNNEL devra rendre compte de la situation sociale, du niveau d'embauche et des conditions d'exploitation tous les 6 mois pendant une période de deux années de la présente Ordonnance au Juge Commissaire et au Mandataire Liquidateur"⁵.

3.5 Furthermore, even if an application was successfully made to the French Tribunal de Commerce in the first instance, the decision would be open to challenge by any interested party, be that GET, the SCOP (or its employees) or the French Government. Such a situation would, at the very least, cause significant procedural delay, adding both to the financial cost and uncertainty of the proposed remedy.

Divestiture of MyFerryLink SAS

3.6 In principle the SCOP agrees that divestiture of MyFerryLink SAS would ensure separation of the commercial operations of MyFerryLink from GET. However, any such remedy must ensure sufficient protection for the SCOP in the long-term (as set out in paragraph 21 of the Supplementary Notice).

3.7 In essence, this is the remedy proposed by the SCOP (see Part E below) which envisages an extension of the SCOP's existing contractual arrangements with GET to match at least the duration of the Inalienability Clause and the SCOP having the right to assume control of the Vessels and/or the MyFerryLink commercial operation at that time.

Divestiture of the MFL business or assets

3.8 The SCOP agrees with the CC's understanding that alternative structural arrangements that would give rise to a divestment of the MFL business or assets (including long-term charter

³ Supplementary Notice, paragraph 17.

⁴ See also the note [§<] which makes clear that the liquidation process ends only on expiry of the five year period and that a change of flag prior to that date would give rise to the liability for the SeaFrance creditors.

⁵ Order of the French Tribunal de Commerce of 11 June 2012. The CC has both original and convenience translations of the Order.

arrangements) are likely to face the same challenges as set out above, given the likelihood that the French Court construes the Order widely.

Divestiture considerations

- 3.9 As the SCOP has previously submitted to the CC, a divestment remedy would lead to a reduction in choice for consumers from 3 to 2 ferry operators on the short sea. This would directly conflict with the CC's own guidelines, which state that when considering remedies, the CC may have regard to relevant customer benefits, namely lower prices, higher quality or greater choice, or greater innovation⁶.
- 3.10 The SCOP further believes that this reduction in choice will inevitably lead to a reduction in capacity, making it highly likely that a divestiture remedy would facilitate higher prices for customers. Customers would also have less choice in the time and number of ferry crossings on the short sea. For example, customers would immediately lose the benefit and choice of the 24 daily crossings currently offered by MFL. At least some of these customers would be expected to divert to the Shuttle, in spite of the higher prices for using this service.
- 3.11 As submitted previously, the SCOP is also concerned that a divestiture remedy would run contrary to the principles of cooperation between national competition authorities enshrined in the European Commission's Best Practice Guidelines⁷. The SCOP also notes the response of the French Competition Authority to the CC's Provisional Findings Report.
- 3.12 Furthermore, as the CC appears to be aware from paragraph 24 of the Supplementary Notice, identification of a suitable third party purchaser raises significant issues. The CC has ruled out P&O "*due to the scale of its existing short sea ferry operations*", yet makes no such comment with regard to DFDS. This is surprising given the scale of DFDS' operations and the significant growth it has achieved over the past year, largely at the expense of P&O. Indeed, the most recent short sea market share statistics show that DFDS now has a very substantial share of just over 23% for freight and indeed carried more cars in January 2013 across the short sea than P&O⁸.
- 3.13 In addition, as DFDS itself recognises, DFDS is highly unlikely to be in a position to guarantee the long-term prospects of the SCOP and it is clear from its response to the CC's Initial Remedies Notice that DFDS would have no intention to work with the SCOP should it acquire any of the Vessels⁹. It therefore seems improbable that DFDS would be in a position to satisfy the SCOP (let alone the French Court) that acquisition by it would meet the employment considerations taken into account only last year when awarding the Vessels to GET.
- 3.14 Consequently, the SCOP does not consider any divestiture remedy, however structured, to be proportionate, practicable or capable of effective implementation and welcomes the CC's willingness to consider alternative possible remedies.

⁶ Merger Remedies, Competition Commission Guidelines, CC8, paragraph 1.14.

⁷ Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 8 November, 2011.

⁸ IRN Research, Ferrystat January 2013.

⁹ "*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.... 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*", DFDS Response to the Initial Remedies Notice, paragraph 5.2.

4. **Part B: Divestiture after expiry of the Inalienability Clause and recommendation for a market investigation**

4.1 The CC has also invited views on a divestiture of the MFL business or its assets after expiry of the Inalienability Clause on 11 June 2017 and, if it is not practicable to implement any divestiture (either now or after that date), whether a recommendation for a market investigation might be a suitable remedy. We deal with each of these issues in turn.

Divestiture of the MFL business or its assets after expiry of the Inalienability Clause

4.2 The role of the SCOP is integral to the operation of the Vessels. The French Tribunal de Commerce is clear in its determination that the order was given with the buyer's "*labour-related commitments*" ("*au regard des engagements pris en matière social*") in mind. As such, to the extent that the CC is considering divestiture after expiry of the Inalienability Clause, it is crucial that the CC consider the impact of such divestiture on the SCOP and its employees.

4.3 Furthermore, as the SCOP has previously submitted to the CC in its response to the Provisional Findings, the CC's provisional conclusion that the transaction has given rise to an SLC is predicated on a number of cumulative hypotheses holding true¹⁰.

4.4 There is therefore a very significant risk in seeking to impose a remedy solution now that will take effect in 4 years' time with no ability to review how the market has in fact developed over that period. For this reason, the SCOP considers that a remedies package comprised of appropriate behavioural commitments coupled with a market investigation remedy (see below) would not only address the SLC identified in the Provisional Findings, but would also be practicable, comprehensive, capable of effective implementation and would uniquely allow the competition authorities to address the actual merger outcome rather than merely a hypothesis.

Market investigation

4.5 As the CC will be aware from previous submissions, the SCOP is concerned that the CC has presented a highly theoretical hypothesis of potential competitive harm, based on a cumulative set of assumptions about market development over the medium to long term. These views are not shared by the SCOP and, crucially, are not supported by the evidence that is available at this stage.

4.6 Whilst it is the nature of a merger review process that the CC is required to make predictions about future events which may or may not occur in the market (e.g. continued market expansion and demand, and the exit of DFDS from the market), the SLC identified in this case particularly susceptible to the risk that the CC's assumptions will not hold true. Given the requirement that any remedy imposed by the CC take into consideration the obligations of the Order of the French Tribunal de Commerce, the CC has a unique opportunity to undertake a post-event analysis of actual post-merger market conditions.

4.7 A market investigation commencing in 2015 would allow the competition authorities to review the market as it has actually developed and to reach decisions in advance of the expiry of the Inalienability Clause in 2017 (at the latest). It would also allow the market to develop freely and to decide on the best outcome for consumers and services generally across the short sea.

¹⁰ See paragraphs 4.1-4.3 of the SCOP's Response to the Provisional Findings.

- 4.8 Furthermore, a market investigation would ensure that the competition authorities retain the full suite of remedy options available should concerns persist as a result of a retrospective market review, based on evidence of actual performance and not highly theoretical hypotheses.
- 4.9 The SCOP is therefore supportive of a potential market investigation beginning in January 2015. In addition, the SCOP considers that certain behavioural commitments (as outlined above and in the SCOP's remedy proposal at Part E below) would help to ensure the continued operation of the MyFerryLink business in a manner independent of GET. However, the SCOP does not consider that price controls are necessary (see further Part D below).
- 4.10 Further, the SCOP proposes that a market investigation could potentially be an effective and practicable remedy if coupled with the SCOP's remedy proposal (as set out in its Initial Response to the CC's Notice of possible remedies and at Part E of the CC's Supplementary notice), in the interim period.
- 4.11 Such a remedies package would have the following benefits:
- The CC would avoid the risk of making a decision based on incorrect assumptions, ensuring that the final decision is made based on actual market evidence, whilst still reserving the right to impose remedies should an adverse effect on competition ultimately be identified;
 - The package would not conflict with the French Tribunal de Commerce order and would be compatible with the decision of the French Competition Authority;
 - The separation of the Eurotunnel and MFL businesses in the interim period could be secured; and
 - Relevant customer benefits would accrue. Customers would have access to a greater choice of service providers (3, not 2, ferry operators on the short sea), leading to a greater choice of crossings and lower prices as a result of increased capacity and competition.

5. **Part C: Cessation of operations on certain routes**

- 5.1 The SCOP would be highly concerned were the CC to consider further the remedies set out at Part C of the Supplementary Notice (i.e. obligations on GET to cease operating ferry services (through its arrangements with SCOP) on either the short sea or on the Dover-Calais route). The SCOP does not consider that either of these remedy proposals would be practicable or effective in addressing any SLC. In addition, such a remedy proposal would be disproportionate, would lead to an immediate reduction in consumer choice (with consequent short, medium and long-term implications for customers in the form of higher prices and reduced innovation and service quality as a result).
- 5.2 Furthermore, either of these remedies would be catastrophic for the SCOP, resulting in the exit of MyFerryLink and severe job losses for the SCOP's members. Indeed, the SCOP welcomes the CC's view, at paragraph 34 of the Supplementary Notice, that it will take into account the possible consequences of possible remedies for GET's arrangements with the SCOP.
- 5.3 With that in mind, this remedy proposal is clearly incompatible with the order of the French Tribunal de Commerce because it would not protect the "*engagements pris en matière sociale*", nor would it avoid a "*transaction spéculative au détriment des créanciers*".

5.4 Given the CC's need to have regard to the principle of proportionality and the availability of alternative, less intrusive, more practicable and effective remedies, the SCOP considers it fanciful that the proposals at Part C would be compatible with the CC's statutory obligations.

6. **Part D: Short term price controls**

6.1 At Part D of its Supplementary Notice, the CC considers whether price controls could be an effective measure if applied pending a divestiture or market investigation as set out in Part B. Such price control measures would apply to Eurotunnel's ability to set prices on the tunnel services.

6.2 While price controls may be effective in the short term, such a remedy is extremely intrusive to normal commercial behaviour and is entirely disproportionate to the remote nature of the perceived harm that may accrue as a result of the transaction (harm which the SCOP does not believe will accrue).

6.3 The SCOP believes that less intrusive remedies are available, namely a combination of the SCOP's remedy proposal (including the behavioural remedies inherent in that proposal) with the potential for a market investigation (as discussed above).

6.4 Furthermore, the SCOP considers that price controls would be entirely inappropriate in the context of a market investigation remedy as they would lead to significant distortion of the market under review.

7. **Part E: The SCOP remedy proposal**

7.1 The SCOP considers that its remedy proposal is proportionate, capable of effective implementation and would address the alleged SLC identified in the Provisional Findings. Furthermore, the SCOP considers that its proposals are entirely consistent either with remedy proposals that look for a longer-term structural solution after expiry of the Inalienability Clause, or with the market investigation proposal.

SCOP is an independent company

7.2 While MFL SAS may maintain the commercial risk in the interim period, the SCOP's remedy proposal seeks to establish complete separation from GET of all MFL commercial staff and commercial management (including those working with MFL SAS). This would plainly be a suitable, proportionate and effective remedy in addressing the CC's main theory of harm related to horizontal unilateral effects because neither GET nor anybody else would have any control over the activities, including pricing activities, of the MFL business operated by the SCOP. This could also be supported by the continuation as appropriate of the existing interim undertakings.

7.3 In addition, this remedy is further strengthened by the existence of the undertakings which have already been given to the French Competition Authority, which ensure functional separation of the commercial teams of the Eurotunnel shuttle business and MFL. It must also be noted that these commitments to the French Competition Authority are further reinforced by the existence of a Monitoring Trustee who is already monitoring compliance with the commitments given by GET to the French Competition Authority.

7.4 The SCOP would also like to reiterate its previous submissions to the CC that it is entirely independent of GET, tied only by the terms of a [X] bareboat charter and commercial operation agreement entered into with MFL SAS.

SCOP remedy proposal is compatible with the order of the French Tribunal de Commerce

- 7.5 The SCOP remedy proposal complies with the decision of the French Tribunal de Commerce. Its proposal would not induce any breach of its order, including the Inalienability Clause, since GET would not be required to divest any assets prior to expiry of the Inalienability Clause. The buyer's labour-related commitments would also be left unfettered and there would be no speculative transaction to the detriment of creditors.

SCOP remedy proposal is compatible with the principles of cooperation between national competition authorities

- 7.6 The SCOP's proposed solution would respect the principles of cooperation between national competition authorities, whilst addressing the perceived harm identified by the CC.

Development of the SCOP remedy proposal

- 7.7 To the extent that the CC maintains its view that the SCOP's remedy proposal does not, of itself, address the alleged SLC, the SCOP believes that a combination of its remedy proposal (Part E of the Supplementary notice) along with a recommendation for a market investigation (Part B of the Supplementary notice) would together form an effective, practicable and proportionate solution.
- 7.8 The SCOP would welcome the opportunity to discuss this remedy proposal with the CC in the course of its investigation.

8. Relevant customer benefits

- 8.1 As previously submitted, the SCOP considers that the launch of MFL has been a pro-competitive event, giving rise to merger-specific and immediate customer benefits, including:
- An increase in choice and capacity as a result of the increase in the number of ferry operators on the short sea from 2 to 3.
 - Corresponding downwards pressure on price resulting from increased capacity, choice and a highly competitive environment on the short sea.
 - Higher quality of service, including significantly greater overall frequency of crossings between Dover and Calais as a result of MFL's 24 daily crossings.
- 8.2 These customer benefits have not only accrued directly as a result of the transaction, they are clearly benefits which are also unlikely to have accrued in the absence of the pro-competitive launch of MFL. Further, any divestment remedy or similar attempt to cease operation of MFL would result in an immediate loss of these benefits, to the detriment of all customers across the short sea.
- 8.3 These are not only tangible customer benefits, recent statistics¹¹ support the contention that customers have welcomed the launch of MFL together with the increased innovation, service frequency and capacity that this has brought to the short sea by increasingly choosing to sail with MFL.

¹¹ See further paragraph 3.12 of the SCOP's Response to the Remedies Notice.